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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEONARD PELITER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM M. KUNSTLER
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

Attorney for Petitioner

Of Counsel:

BRUCE ELLISON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, LEONARD PELTIER, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the District of North Dakota denying him a new trial, duly made and entered the 11th day of September, 1986. App. at 1A.

QUESTIONS PRESENTED

1. Did the court of appeals misinterpret and/or misapply this Court's ruling in Bagley v. United States, 473 U.S. __, 105 S. Ct. 3375 (1985)?

2. Was the ruling of the court of appeals in conflict with those of other courts of appeals interpreting and/or applying the standard of materiality set forth in Bagley?

3. Did the ruling of the court of appeals, given the facts of this case, constitute a gross miscarriage of justice?

PARTIES TO THE PROCEEDINGS

All of the named parties to this proceeding are listed in the caption to this petition.

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OPINIONS BELOW

The opinion-judgment of the Court of Appeals for the Eighth Circuit is reported at 800 F.2d 772 (8th Cir. 1986), and is included in the Appendix hereto at 1A. Two petitions for rehearing and suggestions for rehearing en banc were denied by orders dated December 30, 1986 and March 23, 1987, respectively, and are included in the Appendix hereto at A29 and A30. The decision of the United States District Court for the District of North Dakota of May 22, 1985, is reported at 609 F. Supp. 1143 (D.N.D. 1985) and appears at A 32.

STATUTORY PROVISIONS

FIFTH AMENDMENT

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

****

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Report of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in Chief at the trial.

****

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

18 U.S.C. 3500

Demands for production of statements and reports of witnesses.

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(b) After a witness called by the United States has tetified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

****

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

JURISDICTION

The Court of Appeals decision of which review is sought was issued on September 11, 1986. App. at A1. The petitions for rehearing and suggestions en banc were denied on December 30, 1986, and March 23, 1987, respectively. App. at A29 and A30. On March 25, 1987, petitioner's motion to extend his time to file this petition was granted until May 29, 1987. App. at A81. Leave to file a petition of fifty pages in length was granted on May 20, 1987. App. at A82. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(a).

STATEMENT OF THE CASE

On June 26, 1975, two special agents of the Federal Bureau of Investigation, Jack Coler and Ronald Williams, were killed by gunfire at the Pine Ridge Indian Reservation in South Dakota. Subsequently, James Eagle, Robert

Robideau, Darelle Dean Butler and petitioner, all Native Americans, were each charged in an indictment returned by a grand jury of the District of South Dakota on November 25, 1975[1] with two counts of murder. In July of 1976, Robideau and Butler were acquitted by a jury in the United States District Court for the Northern District of Iowa, Cedar Rapids, Iowa, CR76-11 (N.D. Iowa, 1976), following which the charges against Eagle were dismissed upon the Government's motion.

Appellant, who had been extradited on the above charges from Canada upon the strength of three affidavits attributed to one Myrtle Poor Bear, which the

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[1] A superseding indictment was returned on January 12, 1976, which did not materially alter the original charges.

Government later admitted below were false and fabricated, App. at A83, was then tried before United States Chief District Judge Paul Benson in the United States District Court for the District of North Dakota to which his case had been mysteriously transferred after the Robideau-Butler acquittals. Following his conviction by a jury in Fargo, N.D., in April of 1977, he was sentenced on June 1, 1977 to two consecutive terms of life imprisonment. His said convictions were subsequently affirmed by the court below. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. den. 440 U.S. 945 (1979).

Petitioner, after receiving certain FBI documents pursuant to the Freedom of

Information Act, 5 U.S.C. 552, 552a,[2] which contradicted the trial testimony of an FBI ballistics expert as to whether an AR-15 rifle attributed to him had fired the fatal shots, moved in the trial court, pursuant to 28 U.S.C. 2255, for a new trial. Upon the denial of said motion without a hearing, petitioner then appealed to the court below which then remanded the matter to the trial court for an evidentiary hearing. United States v. Peltier, 731 F.2d 550 (8th Cir. 1984), App. at A94.

After a three-day evidentiary hearing in Bismarck, N.D., on October 1-3, 1984, the trial court, on May 22, 1985, denied the said motion. App. at A32. Petitioner appealed to the court

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[2] See Peltier v. Department of Justice, No. 84-5545 (D.D.C. 1984).

below which, on September 11, 1986, eleven months after oral argument, affirmed the trial court's decision. App. at 1A. On December 30, 1986 petitioner's petition for reconsideration and suggestion for rehearing en banc was denied thereby. App. at A29. Subsequently, petitioner again applied for reconsideration and en banc rehearing based on the apparently mistaken impression of the court below that there had been only one AR-15 at the scene of the shooting, which were subsequently denied, one Circuit Judge dissenting, on March 23, 1987. App. at A30.

STATEMENT OF FACTS

After the shooting of Special Agents Coler and Williams, it was discovered that they had been killed with "a high velocity, small caliber weapon fired at

point blank range." 585 F.2d at 319.[3] On March 10, 1976, defendants Butler and Robideau, in their motion for discovery and inspection, pursuant to Rule 16, FRCrP, sought "all results or reports of physical ... examinations, including, but not limited to, ... scientific tests or experiments arguably relevant to this case, including, but not limited to, ... ballistic ... analysis," "[A]ny and all ballistics reports arguably related to the offenses charged," and "any and all reports and other information," relating to "tangible objects" allegedly located "on, in, or near" the agents' bodies, including "ballistics evidence."

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[3]An AR-15 is such a weapon. One recovered near Wichita, Kansas, on September 10, 1985, App. at A116, was attributed to petitioner, although there was no evidence adduced at trial to prove that he had ever possessed or used it.

On March 19, 1975, Hon. Andrew W. Bogue, the original district judge, ordered the Government to disclose any "results and reports of physical ... examinations, scientific tests or experiments ..." together with "all information and material known to the government which may be favorable to the defendant ... within the scope of Brady v. Maryland, 373 U.S. 83 (1963)." The government filed its first Notice of Compliance with this order on April 15, 1976. Attached to this Notice was the first and only list of disclosed documents initialed by defense counsel.

On April 20, 1976, in ruling on a defense motion to order disclosures of evidence-in-chief at trial pursuant to Rule 16, Judge Bogue ordered the government to provide the defense with a proposed exhibit list and "further directed, pursuant to prior discovery

order ... to allow counsel for the defendants to inspect any laboratory reports which have been prepared to accompany or explain said items of physical evidence ..." The court also reminded the government of its "continuing duty of disclosure under Rule 16 ... and the prior order of this court."

Before the discovery process was complete, petitioner's case, along with those of Butler and Robideau, were transferred, because of anti-Indian prejudice in the Dakotas, to the Northern District of Iowa for trial before Chief Judge Edward J. McManus. Although petitioner had not yet been extradited from Canada, an attorney was orally appointed by Judge McManus to represent him. Judge McManus also ordered that "Whatever rulings he [Judge Bogue] had made as to the other defendants will apply to Peltier." In addition to

ordering compliance with the original discovery order, he directed that there be "full and complete disclosure of Brady material."

On May 13, 1976, Chief Judge McManus filed an Order on Final Pre-trial Conference, requiring the government to provide the defense with "all Jencks Act (18 U.S.C. §3500) statements," and "Brady material" by various dates. As Judge Bogue had previously ordered, the government was instructed to "promptly comply with its continuing duty to disclose discoverable matters."

The following day, defendants filed a Supplemental Motion for Discovery, requesting "immediate disclos[ure] [of] all Brady material not directly relating to allegedly sensitive witnesses," and for the government to

> 17. [D]isclose what firearms, ... each of the defendants is alleged to have used on June 26, 1975, together

> with the information [upon which] the government believes for each firearm, that the respective defendant allegedly used such firearm. (Emphasis added.)

This request, together with the ordered disclosure of Brady and Jencks materials, should have resulted in discovery of various teletypes and memoranda sent by the field agents to the FBI laboratory concerning the Bureau's theory and information that petitioner had used the AR-15 recovered at Wichita, Kansas, to kill Coler and Williams, together with other documents wherein the FBI subsequently believed that other AR-15s were used by petitioner.

On May 17, 1976, defendants filed a Second Supplemental Motion for Discovery and Inspection, specifically requesting disclosure of teletypes:

> 40. ... dated ... 9/24/75, ... 9/27/75 ... 10/2/75' as described in LC# B-13972, dated 10/9/75. (emphasis added)

The other critical October 2, 1975 teletype at issue in this case, was also requested.[4] Defendants further requested disclosure of an "airtel dated 9/12/75, as described in LC# B-13972, dated 10/22/75."

The government, in its resistance to the Second Supplemental Motion for Discovery, and two other such motions, stated that its objection to disclosure was based upon the contention that "[i]n light of the discovery already affected in this case, the three supplemental

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[4]This teletype from FBI firearms expert Evan Hodge stated that the AR-15 attributed to petitioner "contains different firing pin than that in rifle used at ... scene." App. at A114. See the field office's response of the same date. App. at A115. It was subsequently amplified by a report of October 31, 1975, explaining that none of the only three recovered AR-15s "could be associated" with any of the "ammunition components" found at the scene. App. at A117.

discovery motions ... are largely superfluous and should be denied." Additionally, it claimed the discovery sought was not "shown to meet the materiality requirement of Rule 16(c)," and that much of it "consists of material discussed in Rule 16(a)(2)."

The government went on state, in Paragraph 7 of its Resistance, that "[i]n spite of the government's contention that the discovery sought should be denied, the Government is now voluntarily undertaking the task of assembling for delivery to the defense those requested materials which can be secured without placing undue or impossible burdens on resources available for trial preparation." (emphasis added) However, it failed to turn over the documents requested in the Second Supplemental Motion for Discovery, as described above. It also failed to disclose these documents

as required by 18 U.S.C. §3500, Rule 16(A)(2), FRCP, and Brady.

The discovery proceedings in the Butler/Robideau trial, binding as to the government's obligations to petitioner by the order of Chief Judge McManus, led it to make broad representations to Chief Judge Benson in pre-trial proceedings. On February 14, 1977, after petitioner had been extradited to the United States, a pre-trial conference was held in Sioux Falls, S.D. When discovery became an issue, the prosecution represented "there has been literally total disclosure in this case."

> I am saying very straight forward and honestly, Your Honor, that there is very little, if anything, to my knowledge right now that is within the knowledge or the capacity of the government by way of evidence that isn't or hasn't been already within the knowledge and capability of at least the counsel who, in the last trial, participated in it. Now, the defendant did not, Your Honor, but I would like the record to indicate that as counsel, Mr. Taikeff, did

> participate in early proceedings at that particular trial, and so he was on notice, one, that he had a defendant; two, that all these proceedings were going to take place. And so he doesn't walk into this courtroom today, Your Honor, as Mr. Lowe has indicated to you, as he did in the last trial, not knowing anything by way of what has taken place. In fact, all the documents, literally all the 302s literally are within their possession right now. (Emphasis added.)

Sioux Falls Pre-Trial Conference Transcript at 29.

REASONS FOR GRANTING THE WRIT

I. THE GRANTING OF A WRIT OF CERTIORARI IN THIS CASE IS NECESSARY AND APPROPRIATE TO ELIMINATE THE CONFLICT WITH THE DECISION OF THIS COURT IN UNITED STATES V. BAGLEY REGARDING THE TEST OF "MATERIALITY"

A. Preliminary Statement

The opinion below raises the question of the proper interpretation and scope of the test of "materiality" adopted by this Court in United States v. Bagley, 473 U.S. __, 105 S. Ct. 3375 (1985) where a conviction has been obtained through the suppression of favorable evidence.

B. The Holding Below That, Had Petitioner Been Furnished A Withheld Ballistics Report Directly Contradicting The Most Significant Evidence Against Him, As Well As Other Reports Relating Thereto, The Jury Would Probably Not Have Acquitted Him, Not Only Violates The Bagley Standard, But All Logic, Reasonableness And Rationality

As this Court noted in Bagley:

> The Brady rule is based on the requirement of due process. Its purpose is ... to ensure that a miscarriage of justice does not occur ... [by requiring the prosecutor] to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial ... (emphasis added)

473 U.S. at __, 105 S. Ct. at 3380.

In its application of "the rules set forth in Bagley to this case, the court below found:

> 1. (The government's theory at trial was the Petitioner killed the two FBI agents at pointblank range with a .223 caliber rifle described as "the Wichita AR-15."[5] Under this

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[5]During oral argument, October 15,
(Footnote Continued)

theory, "the ballistics evidence, particularly as that evidence relates to a .223 shell casing, allegedly extracted from the Wichita AR-15 and found in agent Coler's car, is critical."[6] App. at A2.

2. The government acknowledged in closing argument that its case against petitioner was based upon "circumstantial evidence."

800 F.2d at 772 n.1, App. at A2(i).

3. "Questions regarding the FBI's handling and examination of the casing first arose at trial due to inconsistencies in the laboratory reports. A February 10, 1976, laboratory report made by Evan Hodge, the government's ballistics expert, stated that the .223 casing

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(Footnote Continued)
1985, the government argued that it had not proven or attempted to prove that Peltier actually shot the agents. Rather that he was an aider and abettor. And, in a rather interesting and significant acknowledgment, the government conceded that it does not know who killed the two agents.

While not discussing this acknowledgment, the court below rejected the government's contention that it had not tried Peltier as a principal. 800 F.2d at 772 n.1, 775, App. at A2, 11.

[6] See, also, United States v. Peltier, 585 F.2d 314, 329 (8th Cir. 1978).

> ... had been loaded and extracted from the Wichita AR-15. In contrast, Hodge's October 31, 1975 report stated that '[n]one of the other ammunition components recovered at the RESMURS scene could be associated with [the Wichita AR-15].' At the time of this earlier report, Hodge had both the .223 casing and the Wichita AR-15 in his possession."

800 F.2d at 776, App. at A13-14.

> 4. The explanation of Agent Hodge at the post-trial evidentiary hearing as to the reasons for his claimed delay in examining "the most important piece of evidence in this case" [800 F.2d at 775], (namely, that he was not aware of any particular urgency connected to the casing and had not received any priority requests concerning it and the Wichita AR-15 was) "facially inconsistent with the newly-discovered evidence, which included several teletypes from FBI officials and agents specifically requesting Hodge to compare submitted AR-15 rifles with .223 casings found at the scene." (Emphasis added.)

800 F.2d at 776, App. at A14-15.

> 5. "[T]he newly-discovered evidence indicat[ed] Hodge may not have been telling the truth ... (emphasis added).

800 F.2d at 777, App. at A17.

6. "[W]e find that the prosecution withheld evidence from the defense favorable to Peltier." (Emphasis added.)

800 F.2d at 775, App. at A10.

7. "[H]ad this evidence been available to the defendant, it would have allowed him to cross-examine certain government witnesses more effectively." (Emphasis added.)

Ibid.

8. "If the newly discovered evidence had been available at trial (the evidentiary rulings below that prevented the Defense from demonstrating the importance of the ballistics inconsistencies) might very well have been different." (Emphasis added.)

800 F.2d at 777, App. at A19.

9. "One of the sources of discomfort with our decision is that although the defense was aware at trial of the inconsistencies, it was not able to demonstrate their importance because of an evidentiary ruling by the district court."

800 F.2d at 777, App. at A18.
Ibid.

10. The ruling in question "refused to allow defense counsel to mention the dates of the [inconsistent] reports or any inferences to be drawn from the dates in his argument to the jury. Since the primary

> impeachment value of the reports is that their timing creates an inference that the FBI lab may have changed its conclusion concerning the relation of the .223 casing found in Coler's trunk to the Wichita AR-15 only after it appreciated the alleged connection between the shell, the Wichita AR-15 and the murders, the argument foreclosed by the ruling could have been significant."

800 F.2d at 777 n.8, App. at A19(i).

> 11. "In any event, the defense would have had 'substantial' additional documentary evidence upon which to cross-examine Hodge, and would have had greater reason to pursue the inconsistencies more vigorously than it did."

800 F.2d at 777, App. at A19.

> 12. "There is evidence in this record (conceded fabrication of eye-witness account affidavits submitted to the Canadian authorities which induced them to extradite petitioner) of improper conduct on the part of some FBI agents ..."

800 F.2d at 778, App. at A21. See, also United States v. Peltier, supra, 585 F.2d at 335 n.18.

> 13. (The government made an) "obvious error" (in informing the court below that) "the trial

witnesses also testified that there was only one AR-15 in the compound prior to the murders, that this weapon was used exclusively by Leonard Peltier and was carried out by him after the murders."

800 F.2d at 779, App. at A25.

14. "In light of the full record, the jury might have given additional weight to the fact that there was more than one AR-15 in the compound on June 26 (sic) had the inconsistencies in the ballistics evidence introduced at trial been supplemented with the reports and data discovered after trial. Moreover, under such circumstances it might have given more serious consideration to the possibility that an AR-15 other than the Wichita AR-15 was used in the murder of either Coler or Williams ..." (Emphasis added).

Ibid., App. at A27

15. There is a possibility (emphasis in original) that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case. (Emphasis added.)

800 F.2d at 779-780, App. at A28.

Given the above, it is utterly inconceivable that any court could legitimately and logically reach the wholly subjective conclusion, that it was not "convinced" that, had the wrongfully withheld records and data been available to petitioner "in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case, the jury probably would have reached a different result." Ibid. (Emphasis added.) This incongruity is further compounded by the fact that, on virtually the identical evidence presented below, absent the aforesaid ballistics testimony, petitioner's two co-defendants were acquitted by a jury in Cedar Rapids, Iowa, a year earlier. See, United States v. Butler and Robideau, CR76-11 (N.D. Iowa 1976).

Additionally, it must be kept in mind that, at any new trial of

petitioner, the "other crimes evidence" introduced at his trial, namely, a Wisconsin charge accusing him of the attempted murder of a Milwaukee police officer, State v. Peltier, No. 7676 (Wis, Cir. Ct., Milwaukee Co., January 27, 1978), and an Oregon burglary charge, State v. Peltier, No. 2122C (Ore. Cir. Ct., Malheur Co., September 7, 1977) would no longer be available to the government because of his subsequent acquittal in Wisconsin and the dismissal of the Oregon charges.

Furthermore, with reference to the "materiality" test set forth in Bagley, the panel misapplied it. In Bagley, this Court held that, where evidence had been suppressed by the prosecution, a new trial was required if the withheld material "undermines the confidence in the outcome of the trial." 105 S. Ct. at 3381. Confidence in a verdict is

undermined if "there is a reasonable probability that ... the result of the trial might have been different." Ibid., 105 S. Ct. at 3383-3384. (Emphasis added.) In the Court's words:

> [T]he reviewing court should assess the possibility that such effect might have occurred in light of the totality if the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the trial would have taken had the defense not been misled by the prosecutor's incomplete response. (Emphasis added.)

105 S. Ct. at 3384.

Simply stated, laying the above findings against the Bagley standard mandates a new trial in this case. In Bagley, this Court did not fashion the term "reasonable probability" to mean that the reviewing court must affirm the denial of a new trial unless it finds, virtually to a near certainty, that the withheld evidence, had it been available to the defense, would have resulted in an

acquittal. The requirement is merely that "there is a reasonable probability that ... the result of the trial might have been different." Ibid.

Parenthetically, in Bagley, which involved a non-jury trial, the withheld information involved federal agency contracts with the principal government witnesses "stating the the Government would pay money to [them] commensurate with the information furnished [during the investigation]." 105 S. Ct. at 3378. The money actually paid these witnesses amounted only to $300.00. Unlike this case, the withheld material in Bagley did "not involve a direct restriction on the scope of cross-examination." 105 S. Ct. at 3381. As this Court there stated:

> The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination.

Ibid. The contrast between what was withheld in Bagley, and what was here suppressed is so stark that it is factually and rationally impossible to reach the same conclusion in this case without perverting all law and logic.

II. THE RULING BELOW IS IN SHARP CONFLICT WITH HOLDINGS OF OTHER COURTS OF APPEALS ON THE ISSUE OF THE "MATERIALITY" OF EVIDENCE SUPPRESSED BY THE GOVERNMENT RESULTING IN A LACK OF UNIFORMITY IN DECISION MAKING.

A. Preliminary Statement

It is respectfully submitted that a review of the post-Bagley opinions of the various Courts of Appeals reveals the current decision in petitioner's case would probably have been decided differently, under their respective and conflicting interpretations of the meaning and application of the Bagley standard.

B. Meaning of "Reasonable Probability"

The majority of the Bagley court agreed with Justice Blackmun's emphasis that:

> The holding in Brady v. Maryland requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment' ... and 'that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' (Emphasis added.)

Ibid, 105 S. Ct. at 3379-3380 [citing, Brady v. Maryland, supra 373 U.S. at 87, 83 S. Ct. at 1196, and Giglio v. United States, supra, 405 U.S. at 154, 92 S. Ct. at 766]. Justice Blackmun then wrote a new unitary standard for determining materiality of previously withheld evidence:

> [E]vidence is material only if there is a reasonable probability, that had the evidence been disclosed to the defense, the result of the proceeding would have been different. (Emphasis added.)

105 S. Ct. at 3384. He went on to define "a reasonable probability" as "a

probability sufficient to undermine confidence in the outcome" (emphasis added). Ibid; United States v. Peltier, supra, 800 F.2d at 774-775; Bagley v. Lumpkin, 798 F.2d at 1300; Lindsey v. King, 769 F.2d 1034, 1041 (5th Cir. 1985).

In the Ninth Circuit's recent analysis, on remand, in granting a new trial to Bagley due to the Government's suppression of a payment contract with the key witnesses against the defendant, it stated:

> We read the Supreme Court's instruction to us in this case that we determine whether there was a reasonable probability that the result of the trial would have been different in conjunction with their admonition that to constitute reversible error, the failure to disclose Brady material must undermine the confidence in the outcome of the trial. In this case, a unanimous panel of three former trial judges find that the kind of information not disclosed in this case was significant. Moreover, we find, that the non-disclosed Brady material was of such significance

> that it creates doubt in our minds as to whether the result of this trial would have been different in this case had the information been disclosed satisfies the reasonable probability standard enunciated by the Supreme Court. (Emphasis added.)

798 F.2d at 1300 n.2.

It went on to note that:

> The proper inquiry is an objective one: whether 'the Government's failure to assist the defense by disclosing information that might have been helpful in conducting cross-examination' undermines the confidence in the outcome of the trial. (Emphasis added.)

Ibid. at 1301. In a prior opinion, United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986), it had affirmed the trial court's granting of a new trial where the latter found that the suppressed evidence went to the credibility of the government's key witness and was, therefore, "crucial to the outcome of the trial." Accordingly, "if the jury had not believed Durant, Shaffer may not have been convicted." 789 F.2d at 689.

The Fifth Circuit similarly has interpreted the Bagley standard to require a determination of whether the reviewing court believes the previously suppressed evidence raises a serious question as to the validity of the verdict. In reversing the denial of a federal writ of habeas corpus in a state murder case, the court of appeals, in Lindsey v. King, supra reasoned:

> There can be no doubt that a reasonable trier of fact could have convicted Lindsey on the basis of Knopf's identification alone. Hence it is possible to reason that even had the impeaching matter reduced the value of Alexander's identification to zero, it is not reasonably probable that the out-come as to guilt or punishment would have changed.
>
> We are tempted but not persuaded, by this arithmetical approach; our experience at the bar has been that positive identification by two unshaken witnesses possesses many time the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of two crucial witnesses--even if the other remains untouched--may have

> consequences for the case extending far beyond the discrediting of his own testimony.
>
> We cannot and should not attempt to retry the case in our imaginations. We can say, however, on the basis of our courtroom experience, that the evidence withheld by the prosecutor in todays case carried within it the potential both for the destruction of Alexander's identification of Lindsey and the discrediting, in some degree, of the police methods employed in assembling the case against him. (Emphasis added.)

769 F.2d at 1042.

In United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986), the Eleventh Circuit affirmed the granting of a motion for new trial of a defendant convicted of marijuana conspiracy and distribution charges. There, the court found that the government's suppression of statement by the defendant prior to his arrest, encouraging the continued presence of the Coast Guard due to the pending arrival of marijuana, went to "the question of intent [which] was the critical issue before the jury at trial." Apparently

due to the absence of this corroborating evidence, the defendant did not testify at his trial regarding the incoming boatload of marijuana. In reaching its determination of materiality under the single Bagley test, the court reasoned:

> Even though Severdija must be assumed to have known of his own statement, in the absence of any means of corroborating his claim to have made it, jurors might well have disbelieved him and held the falsity of his testimony against him. it is conceivable that Severdija recognized the possible detrimental effect of such an uncorroborated self-serving statement and thus refrained from raising the statement before the jury. Regardless of the reason for the lack of reference to the statement at trial, had Severdija known that his testimony could have been corroborated it is highly likely that it would have been given. (Emphasis added.)

790 F.2d at 1559 n.1.

However, the Eighth Circuit apparently believes it must be convinced petitioner "probably" would have been found "not guilty" had the withheld evidence not been suppressed, for him to

be entitled to a new trial. However, even this questionably attainable standard is not met, when the panel concluded that the government's key witness Agent Evan Hodge, "may not have been telling the truth" in his explanation of the inconsistencies in his lab reports on the "critical evidence" in the case [800 F.2d at 775]; that had the suppressed ballistics evidence been revealed in time for trial, evidentiary rulings regarding defense argument on these inconsistencies "might very well have been different" 800 F.2d at 777, App. at A19; defense counsel "would have had greater reason to pursue the inconsistencies more vigorously," and that the evidence cast "strong doubts upon the government's case," 800 F.2d at

779-800.[7] Significantly in terms of the language used by both the Eighth and Ninth Circuits in Peltier, Bagley, King, and Severdija, respectively, the court below concluded:

> In light of the full record, the jury might have given additional weight to the fact that there was more than one AR-15 on the compound on June 26 had the inconsistencies in the ballistic evidence introduced at trial been supplemented with the reports and data discovered after trial. Moreover, under such circumstance it might have given more serious consideration to the possibility that an AR-15 other than the Wichita AR-15 was used in the murder or either Coler or Williams, but we cannot say that it is reasonably probably that it would have

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[7] In United States ex rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985), the court affirmed the granting of a new trial to petitioner where the state suppressed a firearms laboratory worksheet which revealed that a handgun which two police officers testified the defendant fired at one of them, was inoperable. Said the court: "This evidence certainly would have cast doubt on the credibility of Officers Pooler and Martis, the key prosecution witnesses." 769 F.2d at 391.

> been sufficiently impressed by these possibilities to have reached a different result at trial. (Emphasis added.)

800 F.2d at 779, App. at A25.

The use of the term "might" is significant since Justice Blackmun explained the "the reviewing court should assess the possibility that such effect might have occurred in light of th totality of the circumstances," (emphasis added.) 105 S. Ct. at 3384, and whether the suppressed evidence "undermines the confidence in the outcome," 105 S.Ct. at 3381.

Thus, it appears that, in its interpretation of Bagley's new "materiality" test, the Eighth Circuit apparently focused on the words "reasonable probability ... the result would have been different" [105 S.Ct. at 3384], rather than the analyses of the Fifth, Seventh, Ninth, and Eleventh Circuits

which accepted Justice Blackmun's explanation of this standard, viz.:

> A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome. (Emphasis added.)

Ibid.[8]

Further conflicts among the Circuits become evident when one reviews their respective understandings as to the role of a reviewing court. For example, while "[r]ecognizing the difficulty of putting ourselves in the position of the jury," the court below then went ahead and did so in deciding that the jury "probably

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[8] In Strickland v. Washington, __ U.S. __, 104 S.Ct. 2052, 2068 (1984), "reasonable probability" was identified as the test "for materiality of exculpatory information" not disclosed to the defense by the prosecution." See, also, Justice Marshall's dissent in Bagley, 105 S. Ct. at 3389; United States v. Risken, supra, 788 F.2d at 1375; United States v. Kehm, 799 F.2d 354 (7th Cir. 1986).

would not have acquitted him."[9] 800 F.2d at 777. Other circuits, however, clearly have held this is not a proper means of applying the Bagley standard. As the Ninth Circuit explained in Bagley v. Lumpkin, supra:

> The inquiry is not how this or any other judge, as the trier of fact, would subjectively evaluate the

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[9] In Patterson v. Black, Judge Heaney joined Judge Hanson and noted:

> We would additionally question the reach of Bagley in light of the fact that it was a bench trial (unlike the instant case), and that the same judge who tried the case denied the motion for a new trial. Bagley, 105 S. Ct. 3377-78. As a result, any reasonable probability could have been resolved by the district court as finder of fact without the inherent 'difficulty [present in a jury trial such as this] of reconstructing in a post-trial proceeding the course tha thte defense and the trial would have taken ahd the defense not been misled by the prosecutor's incomplete response'." (Emphasis added.)

791 F.2d at 110 n.2.

> evidence. It is, rather, how the absence of the evidence objectively might have affected the outcome of the trial.

798 F.2d at 1301. In Lindsey v. King, supra, the Fifth Circuit stated: "[w]e cannot and should not attempt to retry the case in our imaginations." 769 F.2d at 1042.

C. The Specificity of Requested Disclosure

As the Tenth Circuit observed in United States v. George, 778 F.2d 556, 560 (10th Cir. 1985):

> The disclosure required by Brady v. Maryland, 373 U..S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), is not a rule of discovery. United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). Rather, it is a rule of fairness and the constitutionally minimal prosecutorial obligations.

In the instant case, an examination of the record reveals that petitioner made, through incorporation and adoption of his co-defendant's various discovery -

motions,[10] a number of general to specific requests for laboratory reports and Brady material related to the evidence suppressed in this case. See, Court File, United States v. Butler & Robideau [CR75-5106, 76-5106 (D.S.D.) and

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[10]At the May 10, 1976, pre-trial conference, at which Attorney Elliot Taikeff, on of petitioner's attorneys at his trial, appeared and represented petitioner, Chief Judge McManus entered the following bench order:

> It is the view of the Court that you [Taikeff] should proceed to participate in this pre-trial and that based on your representaiton to the Court that you are authorized to bind and have adopted all the previous motions that have been made on behalf of the other defendants and the Court in ruling on those motions will consider them as having applied to you and that my rulings would be the same as Judge Bogue's rulings were up to this point. Whatever rulings he had as to the other defendants will apply to Peltier.

Cedar Rapids Pre-Trial Conference Transcript, p. 26.

CR76-11 (N.D. Iowa)], a part of the record herein.

The specific disclosures requested by the defense, supra at 6-11, were ordered by Judge Bogue on March 19, 1976 [Ibid., Docket No. 86], together with "all information and material known by the government which may be favorable to the defendant ... within the scope of Brady v. Maryland, 373 U.S. 83 (1963)." Ibid., ¶ 11(c) of Docket No. 86.

On April 20, 1976, in response to a Motion to Order Disclosures of Evidence in Chief at Trial Pursuant to Rule 16 [Ibid., Docket No. 138], the court ordered the government to "segregate these items which it presently believes in good faith are relevant to [their] case in chief" and "further directed, pursuant to prior discovery order ... to allow counsel for the defendants to inspect any laboratory reports which have

been prepared to accompany or explain said items of physical evidence ...." Ibid., Docket No. 164. Notwithstanding this order and a specific request by defendants on May 17, 1976, for the October 2, 1975, teletype which eliminates the Wichita AR-15, the government wilfully suppressed this and other relevant ballistics documentation, falsely representing that "there has been literally total disclosure in this case." Sioux Falls Pre-Trial Conference Transcipt at 29.

However, contrary to the government's representations to the trial court, defense counsel, and petitioner, the Freedom of Information Act (FOIA) disclosures, some four years after petitioner's convictions, revealed this

not to have been a correct statement.[11] The record, in fact, shows that the government suppressed a significant number of pages of documents relevant to .223 caliber ammunition components and AR-15 rifles in this case until the 1981 post-conviction FOIA disclosures. Other pages of other such ballistics documents

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[11] A Brady violation has been held to exist regardless of whether the prosecutor actually knew of the existence of the suppressed evidence. See, e.g., United States v. Agurs, supra, 427 U.S. at 110, 96 S. Ct. at 2400 (prosecutor charged with knowledge of evidence in his file "even if he has actually overlooked it"); Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980) (Brady applies even where the prosecutor was personally unaware of existence of evidence requested but it was available in medical examiner's office); United States v. Auten, 632 F.2d 478 (5th Cir. 1980) (Brady applies where prosecutor failed to run FBI check on witness, and FBI check would have revealed requested information); Government of Virgin Islands v. Martinez, supra, 780 F.2d 302, 308 n.8 (3d Cir. 1985). See, United States v. Jackson, 780 F.2d 1305, 1308 n.2. (7th Cir. 1986) (and cases cited therein).

were withheld until the August 30, 1984 pre-evidentiary hearing discovery order (on remand from the Court of Appeals) had been complied with.[12]

In Patterson v. Black, supra, a majority of a panel of the Eighth Circuit noted:

> On the issue of whether to factor the specificity of the request by defense counsel into the Brady calculus, there was no apparent majority on the Bagley Court. See, United States v. Ben M. Hogan Co., 769 F.2d 1293, 1299 [(8th Cir. 1985)]

791 F.2d at 110, n.2. The majority of the Black court went on to question the non-allocation of the specificity issue within the Eighth Circuit as concluded by the Hogan court. Said Judges Hanson and Heaney:

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[12]What still remains hidden in some 6,000 pages suppressed in their entirety and 5,000 pages in part, is unknown at this time.

> Despite the Ben M. Hogan court's reference in a footnote to the difference of opinion between Justice Blackmun's opinion for the Court and Justice White's concurrence on whether specificity should enter into the Brady inquiry, this court stated that the 'reasonable probability' inquiry was to made 'irrespective of the specificity of the request...' Ibid. at 129.

The Tenth Circuit has noted that

> Justice Blackmun further suggests that in applying this standard courts should consider the specificity of the defendant's request for exculpatory material. Justice White's concurrence sees no need for such an inquiry.

United States v. Kluger, 794 F.2d 1579, 1581 n.3, (10th Cir. 1986).

The Third Circuit in Government of Virgin Islands v. Martinez, 780 F.2d at 307, in remanding the case for an evidentiary hearing, instructed the trial court:

> If the suppressed information was specifically requested, review of its materiality must take that fact into account. In Bagley, the Supreme Court noted that where a specific request has been made, it is more likely that a prosecutor's

> failure to respond will have an adverse effect on 'the preparation or presentation of the defendant's case.' 105 S. Ct. at 3384. (Emphasis added.)

In Lindsey v. King, 769 F.2d at 1041, the Fifth Circuit expressed its view of the relevance of the nature of the requested disclosure as:

> Viewing the opinions as a whole, it is fair to say that all of the participating Justices agreed on one thing at least: that reversal for suppression of evidence by prosecution is most likely where the request for it was specific, as in today's case. (Emphasis added.)

(reversing the denial of a writ of habeas corpus where the prosecution suppressed evidence negating one of two eyewitness identifications).

Thus, while several circuits believe the specificity of a request for evidence then withheld by the government is relevant to a determination of materiality, the court below does not. No reference was made by the latter to

the specific request for the crucial impeachment and exculpatory documents suppressed by the government until years after petitioner's conviction.

D. Application Of Single Test For Materiality To False or Perjured Testimony

A clear conflict between the court below and other circuits as to whether the single test for materiality espoused by Justice Blackmun in Bagley should be applied to situations where the prosecution knew or should have known his case contained perjured testimony, United States v. Agurs, supra, 427 U.S. at 103. The court below interpreted Bagley to hold the unitary test was applicable "in all situations," including those involving the use of false testimony. Smalley v. United States, 798 F.2d 1182, 1187 (8th Cir. 1986).

However, the other circuits have clearly held that "Bagley did not change

the 'any reasonable likelihood' standard, as stated in United States v. Agurs, 427 U.S. 97, 103, for cases involving perjured testimony." United States v. Kluger, 796 F.2d at 1582. See, also, United States v. Brimberry, 803 F.2d 908, 914 (7th Cir. 1986); and United States v. Kelly, 790 F.2d 130, 136 n.3 (D.C. Cir. 1986). Under the Agurs standard, suppressed evidence was material "if there [was] any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Emphasis added.) Ibid., 427 U.S. at 103, 96 S. Ct. at 2397; United States v. Jackson, supra, 780 F.2d at 1309.

Indeed, the court below focused on the issue of the false testimony of Agent Hodge, ignored the "any reasonable likelihood" standard," and clearly applied its misconstrued interpretation

of the Bagley "reasonable probability" standard in making its determination:

> The question now before us is whether the newly discovered evidence indicating Hodge may not have been telling the truth, considered in the light of the evidence the jury had before it, would have caused the jury to reach a different verdict. While that possibility exists, Bagley requires more. It requires us to find that it is reasonably probable the jury would have acquitted Peltier had it been aware of this evidence ... (Emphasis added.)

800 F.2d at 777, App. at A17-18.

In remanding petitioner's case, the court below stated that this document alone:

> [C]ould raise questions regarding the truth and accuracy of Hodge's testimony regarding his ability to reach a 'conclusion' on the firing pin analysis and his positive conclusion regarding the extractor markings. (Emphasis added.)

731 F.2d at 554. It is this "positive conclusion regarding the extractor markings" that provided the critical link from which the government

circumstantially argued that petitioner shot and killed the two agents. 800 F.2d at 775.

In its subsequent analysis, the court below found that:

> At the post-trial evidentiary hearing, Hodge explained that at the time he wrote the October 31 report, he had only examined a small portion of the submitted ballistics evidence, and that he had not gotten around to the .223 casing until December, 1975, or January, 1976. He further testified that he had not been aware of any particular urgency connected with the casing, and had not received any priority requests regarding it. This testimony is facially inconsistent with the newly discovered evidence ... (Emphasis added.)

800 F.2d at 776, and notes 4 and 5. App. at A14-17. As previously mentioned, the court below concluded that the previously suppressed evidence "indicat[ed] Hodge may not have been telling the truth..." 800 F.2d at 777. App. at A17.

The Ninth Circuit, in reviewing the impact of previously suppressed evidence

on the credibility of key witnesses in Bagley v. Lumpkin, supra, said:

> It is inconceivable that evidence of perjury would not, as an objective matter, affect a factfinder's assessment of a witness' credibility. When the evidence shows that the government's only witnesses lied under oath, it is contrary to reason that confidence in the outcome of the case would not objectively be undermined.

798 F.2d at 1301.

III. THE RULING BELOW HAS RESULTED IN A GROSS MISCARRIAGE OF JUSTICE

For all the reasons heretofore set forth, the affirmance of the denial of a new trial to petitioner, who is serving two consecutive life sentences, is a tragic and gross miscarriage of justice, mandating the remedial action of this court.

CONCLUSION

For all of the reasons set forth above, it is respectfully prayed that this Court grant the within petition and issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated: New York, N.Y.
May 29, 1987

Respectfully submitted,

William M. Kunstler

WILLIAM M. KUNSTLER
Center for Constitutional Rights
666 Broadway
New York, N.Y. 10012
(212)614-6464

Attorney for Petitioner

Of Counsel:

Bruce Ellison

APPENDICES

UNITED STATES of America, Appellee,

v.

Leonard PELTIER, Appellant.

National Association of Criminal Defense Lawyers, Inc. and California Attorneys for Criminal Justice,

Amicus Supporting Appellant

Cathedral Church of St. John the Divine, et al.,

Amicus

Certain Members of U.S. Congress,

Amicus Supporting Appellant.

No. 85-5192.

United States Court of Appeals, Eighth Circuit

Appeal from the United States District Court for the District of North Dakota.

Submitted Oct. 15, 1985.

Decided Sept. 11, 1986.

Before HEANEY, ROSS, and JOHN R. GIBSON, Circuit Judges.

HEANEY, Circuit Judge.

On April 18, 1977, Leonard Peltier was found guilty of the June 26, 1975, premeditated murder of Jack Coler and Ronald Williams, special agents of the Federal Bureau of Investigation (FBI). The record as a whole leaves no doubt that the jury accepted the government's theory that Peltier had personally killed the two agents, after they were seriously wounded, by shooting them at pointblank range with an AR-15 rifle (identified at trial as the "Wichita AR-15").[a] The critical evidence in support of this theory was a casing from a .223 caliber Remington cartridge recovered from the trunk of agent Coler's car on June 29, 1975, and received by the FBI firearms identification expert on July 24, 1975. The district court, agreeing with the government's theory of the case, sentenced Peltier to two consecutive life sentences.

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[a] footnote on following pages (i)-(ii)

[a][W]e have submitted strong circumstantial evidence which indicates that Leonard Peltier did in fact fire the fatal shots; but you need not believe that he did. I think that he did, and I think the evidence shows he did.
[Tr. at 4974]
The evidence *** indicates that Leonard Peliter was not only the leader of this group, he started the fight, he started the shootings and that he executed these two human beings at point blank range.
[Tr. at 4975-76]
Out of all the individuals who were involved there was one individual who was most responsible, and I think the evidence iwthout any question proves and establishes beyond any doubt that that was *** Leonard Peltier.
[Tr. at 4976]
Apparently Special Agent Williams was killed first, He was struck in the face and hand by the bullet, as I have demonstrated, probably begging for his life, and he was shot. The back of his head was blown off by a high-powered rifle.
Leonard Peltier then turned, as the evidence indicates, to Jack Coler lying on the ground helpless. He shoots him in the top of the head. Apparently feeling that he hadn't done a good enough job, he shoots him again through the jaw, and his face explodes.
[Tr. at 4996]
The prosecution concluded its argument with the following statement:

> I think my argument can be summed up in a very brief paragraph.
> We have proved the cold-blooded, brutal murder of two human beings. We have proved that beyond any question. We have proved it was

premeditated, planned in the sense that it was not a spur of the moment activity. We have proved beyond a reasonable doubt that Leonard Peltier was responsible for these senseless, brutal, cowardly murders. We have proved that beyond any doubt. We have proved that he organized and directed this camp, started the fight, fired at the agents again and again from the tree-line.

Had we proved nothing further, that in itself would have been first degree murder; but in addition, we proved that he went down to the bodies and executed these two young men at pointblank range. Ladies and gentlemen, that's murder in the first degree. The United States respectfully requests that you return a verdict of guilty on both charges of this indictment.

[Tr. at 5019]

Peltier appealed to this Court from that conviction. He argued strenuously that he had not been given a fair trial because the trial court refused to permit him to fully explore his contention that the FBI had manufactured evidence against him and had intimidated and coerced several witnesses. He also argued that the district court erred in denying him the right to introduce evidence regarding the tensions between the FBI and the American Indian Movement (AIM) on the Pine Ridge Indian Reservation, and had erred in permitting introduction of prejudicial and inflamatory evidence. Peltier also objected to the manner in which the district court handled the ballistic evidence, particularly insofar as that evidence was intended to show his possession and use of the Wichita AR-15 on the day the two agents were killed. He finally complained that the government

had deliberately withheld exculpatory information from the defense and that the trial court had erred in failing to do anything about this failure.

We affirmed the conviction on September 14, 1978. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979). In affirming, we too accepted the government's theory that both agents had been killed with a high-velocity small-caliber weapon fired at pointblank range at a time when the men were seriously wounded and unable to defend themselves. We then held that the evidence was sufficient for the jury to find Peltier responsible for the murders.

On April 20, 1982, Peltier filed a motion to vacate the judgment and for a new trial pursuant to 28 U.S.C. § 2255 (1976). On December 15, 1983, he filed a

second motion for a new trial under Fed.R.Crim.P. 33. The basis of this motion was a mass of data and reports obtained from the FBI under a Freedom of Information Act, 5 U.S.C. § 552 (1982)-(FOIA) request. He simultaneously moved to disqualify the district court judge. The district court denied all motions without an evidentiary hearing. Peltier appealed, arguing that many of the documents received under the FOIA request were exculpatory and should have been made available to him under the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, Peltier argued that the government had improperly withheld information tending to show that the agents had not in fact been killed by the Wichita AR-15. We recognized that the evidence relating to Peltier's use of the Wichita AR-15 on June 26th was critical

to his conviction and remanded the matter to the district court for an evidentiary hearing. We stated:

> At this hearing, the court shall limit its consideration to any testimony or documentary evidence relevant to the meaning of [an] October 2, 1975, teletype [which seemed to rule out the Wichita AR-15 as the murder weapon] and its relation to the ballistics evidence introduced at Peltier's trial. The court shall then rule on whether the evidence adduced below supports Peltier's contention that its nondisclosure violated the Brady doctrine, requiring a new trial.

United States v. Peltier, 731 F.2d 550, 555 (8th Cir 1984)(per curiam).

The district court conducted an evidentiary hearing on the matter and issued a detailed memorandum and order on May 22, 1985. 609 F.Supp. 1143. It held that the October 2, 1975, teletype, evaluated in the context of the entire record, would not have affected the outcome of the trial and that, therefore, Peltier was not entitled to relief.

Peltier appeals to this Court, asking us to make an independent judgment as to whether the previously undisclosed evidence would have produced a different result at trial.

The Legal Standard

In United States v. Bagley, __ U.S. __, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), Mr. Justice Blackmun, writing for the Court, reviewed the Supreme Court cases dealing with a prosecutor's failure to disclose evidence that could have been used effectively to impeach important government witnesses. He stated:

> In Brady v. Maryland, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment."
> The holding in Brady v. Maryland requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or punishment."

Id., 87 L.Ed.2d at 486, 489 (citations omitted). He went on to state:

> Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, *** so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napur v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").
>
> [C]onstitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that is suppression undermines confidence in the outcome of the trial.

Id., 87 L.Ed.2d at 490-91.

He then turned to the question of materiality, and stated that:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable

> probability" is a probability sufficient to undermine confidence in the outcome.
>
> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the Strickland formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstance and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Id., 87 L.Ed.2d at 494 (emphasis added).

After setting out the legal standard, the Court remanded the matter to the Court of Appeals for its determination whether there was a reasonable

probability that had the evidence of the inducement offered by the government to two government witnesses been disclosed to the defense, the result of the trial would have been different.

Applying the rules set forth in Bagley to this case, we find that the prosecution withheld evidence from the defense favorable to Peltier, and that had this evidence been available to the defendant, it would have allowed him to cross-examine certain government witnesses more effectively. This case thus turns on the question whether the evidence withheld by the prosecution is material in the sense that its nondisclosure undermines confidence in the outcome of the trial.

We could have resolved this issue without great difficulty if the government had presented the case against Peltier on the theory that he was an

aider and abettor. The evidence clearly shows that Peltier participated in the shoot-out that resulted in the wounding and ultimate deaths of the two FBI agents. But this is not the government's theory. Its theory, accepted by the jury and the judge, was that Peltier killed the two FBI agents at pointblank range with the Wichita AR-15. Under this theory, the ballistics evidence, particularly as that evidence relates to a .223 shell casing, allegedly extracted from the Wichita AR-15 and found in agent Coler's car, is critical. We thus must examine the evidence that surfaced after trial to determine whether, in the light of that new evidence and the totality of the circumstances, there is a reasonable probability that the jury would not have found Peltier guilty of the two murders if it had known all the facts. We do so with an awareness of the difficulty of

reconstructing the course the defendant would have taken if the withheld evidence had been available to him at trial.

The .223 Casing.

As the government states, the .223 casing found in the trunk of Coler's car was "perhaps the most important piece of evidence in this case." Tr. at 4996. While the autopsies indicated only that the agents had been killed pointblank by a high-velocity low-caliber weapon, the .223 casing pinpointed the Wichita AR-15 as the murder weapon, to the exclusion of all other weapons. Since other evidence connected Peltier to the Wichita AR-15, the .223 casing provided the final link necessary to establish Peltier as the pointblank murderer of both agents.[1]

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[1]Since the autopsies showed that three pointblank shots were fired, the

(Footnote Continued)

Questions regarding the FBI's handling and examination of the casing first arose at trial due to inconsistencies in the laboratory reports. A February 10, 1976, laboratory report made by Evan Hodge, the government's ballistics expert, stated that the .223 casing found in Coler's trunk had been loaded and extracted from the Wichita AR-15. In contrast, Hodge's October 31, 1975, report stated that "[n]one of the other ammunition components recovered at the

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(Footnote Continued)
single casing establishes only an inference that Peltier fired all three shots. The government argues that Peltier and his accomplices found and carried off the other two casings from the Wichita AR-15. We note that the evidence supports the view that there was at least one other AR-15 on the compound on the day of the murders. See infra at 14-15. If Peltier and his associates carried away the casings from the Wichita AR-15 to prevent their use as evidence it is just as logical to assume that they carried away casings from another AR-15.

RESMURS scene could be associated with [the Wichita AR-15]." At the time of this earlier report, Hodge had both the .223 casing and the Wichita AR-15 in his possession.[2]

At the post-trial evidentiary hearing, Hodge explained that at the time he wrote the October 31 report, he had only examined a small portion of the submitted ballistics evidence, and that he had not gotten to the .223 casing until December, 1975, or January, 1976. He further testified that he had not been aware of any particular urgency connected with the casing, and had not received any priority requests regarding it. This testimony is facially inconsistent with the newly-discovered evidence, which

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[2]Hodge received the casing on July 24, 1975, and the Wichita AR-15 on September 12, 1975.

included several teletypes from FBI officials and agents specifically requesting Hodge to compare submitted AR-15 rifles with .223 casings found at the scene,[3] and Hodge's responses to these

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[3]In the July 21, 1975 "airtel" accompanying the shipment of evidence which included the .223 casing found in Coler's trunk, the Rapdi City FBI agency stated that "[t]he cartridges should be compared with weapons received, re: RESMURS, and with other weapons related to RESMURS in an attempt to connect the cartridges with specific weapons." Evidentiary hearing exhibit D-20. In a September 15, 1975, memorandum accompanying evidence recovered on the Rosebud Reservation, the Minneapolis agency asked the laboratory "to test fire enclosed weapons [including an AR-15] and compare slug with slugs recovered from [unknown subject] crimes." Evidentiary hearing exhibit D-24. In a September 20, 1975, teletype to the lab, the Rapid City agency reported that it had information that Peltier had used the AR-15 found on the Rosebud Reservation to kill the agents, and stated that "[t]he Bureau laboratory is requested to conduct all logical examination of the weapons submitted to them in referenced communications." Evidentiary hearing exhibit D-14. In a September 27, 1975,

(Footnote Continued)

teletypes, which, at least prior to February 10, 1975, consistently reported that the casings and rifles were nonidentical.[4] Additionally, from the

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(Footnote Continued)
teletype, the Rapid City agency asked the laboratory to compare certain casings with the Wichita AR-15. Evidentiary hearing exhibit D.32. On this same date, the Rapid City agency sent another teletype requesting the laboratory to "make available to Rapid City a supplemental and confirming report to include all results of comparisons, examinations, tests, analyses, and restorations not previously reported." Evidentiary hearing exhibit D.-15. On October 2, 1975, a teletype from Rapid City to the laboratory stated: "Laboratory requested to compare all .223 casings with AR-15 rifle *** located at Al Runnings's property ***." Evidentiary hearing exhibit 6.

[4]In an October 2, 1975, teletype to Rapid City, the laboratory reported: "Recovered .223 caliber colt rifle received from SA Gammage, BATF, contains different firing pin than that in rifle used at RESMURS scene." Evidentiary hearing exhibit 4. A November 24, 1975, teletype from the laboratory to the Portland and Rapid City agencies reported that "[c]artridge cases fired in submitted weapons in laboratory were

(Footnote Continued)

FOIA request documents, the defense discovered that Hodge had ample reason to focus his attention on the .223 casing. He was aware as early as June 27, 1975, the day after the killings, that the two agents had been killed by a high-velocity low-caliber weapons at close range,[5] and by September 20, 1975, that the investigation had focused on Peltier and an AR-15.[6]

The question now before us is whether the newly-discovered evidence indicating Hodge may not have been telling the truth, considered in the

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(Footnote Continued)
compared with like caliber cartridge cases recovered at RESMURS scene and it was concluded that these two rifles, in their present conditions, could not have fired any of the recovered speciments." Evidentiary hearing exhibit D-22.

[5]Evidentiary hearing exhibit 13.

[6]Evidentiary hearing exhibit D-14.

light of the evidence the jury had before it, would have caused the jury to reach a different result. While that possibility exists, Bagley requires more. It requires us to find that it is reasonably probable the jury would have acquitted Peltier had it been aware of this evidence, and had the defense had an opportunity to question Hodge about the inconsistencies. Recognizing the difficulty of putting ourselves in the position of the jury, we hold that it probably would not have acquitted him. One of our sources of discomfort with our decision is that although the defense was aware at trial of the inconsistencies, it was not able to demonstrate their importance because of an evidentiary ruling by

the district court.[b] If the newly discovered evidence had been available at trial, the district court's ruling might very well have been different. In any event, the defense would have had substantial additional documentary evidence upon which to cross-examine Hodge, and would have had greater reason to pursue the inconsistencies more vigorously than it did.

When all is said and done, however, a few simple but very important facts remain. The casing introduced into evidence had in fact been extracted from the Wichita AR-15. This point was not disputed; although the defense had it own ballistics expert, it offered no contrary evidence. Peltier raises general questions regarding the handling and examination of the .223 casing and the Wichita AR-15, but does not make specific allegations of tampering. There are only

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[b] footnote on following pages (i)-(iii)

[b]The district court's evidentiary ruling clearly hampered the defense in its efforts to point out the inconsistencies in the October 31, 1975, and February 10, 1976, lab reports. Although both reports were admitted into evidence, the Court refused to allow defense counsel to mention the dates of the reports or any inferences to be drawn from the dates in his argument to the jury. See Tr. at 4701. Since the primary impeachment value of the reports is that their timing creates an inference that the FBI lab my have changed its conclusion concerning the relation of the .223 casing found in Coler's trunk to the Wichita AR-15 only after it appreciated the alleged connection between the shell, the Wichita AR-15 and murders, the argument foreclosed by the ruling could have been significant.

The district court based its ruling upon Fed. R. Evid. 613(b). That rule prohibits admission of extrinsic evidence of a prior inconsistent statement by a witness unless the witness has an opportunity to explain or deny the inconcsistent statement, and the party opposing admission of the inconsistent statement is afforded an opportunity to interrogate the witness concerning the statement. See Nebraska Public Power District v. Borg Warner Corp., 621 F.2d 490, 497 (8th Cir. 1976). Rule 613(b), unlike prior practice, does not require the proponent of the inconsistent statement to direct the witness's attention to the inconsistency and afford an opportunity for explanation. All that is required is that the witness have an opportunity for explanation. All that is required is that the witness have an

opportunity to explain. As Judge Weinstein states: "The rule does not indicate that the party introducing evidence of the incocnsistent statement must afford the witness an opportunity to explain. It merely indicates that the witness must be afforded that opportunity." 3 Weinstein and Berger, Weinstein's Evidence 613-24 (Bender 1986).

The record indicates that the defense complied with the requirements of rule 613(b). While Hodge, the agent in charge of preparing the lab reports, was testifying, defense counsel announced his intention to introduce the October 31, 1975 lab report into evidence. At this point, the prosecution knew of the inconsistency in the reports. In fact, the inconsistency arose in the trial of Butler and Robideau the preceding summer. Tr. at 4705. Moreover, the prosecutor even gave Hodge an opportunity to explain the inconsistency during his redirect examination:

> Q. [D]o you remember when it was approximately that you began to examine that particular item along with other items in the shipment of items with which it came to Washington?
>
> A. Yes. It was about the end of 1975, beginning of 1976; January, December, in that area.

Tr. at 3388.

Thus, not only was the prosecution afforded ample opportunity to explain or deny the inconsistency, it did, in fact,

elicit testimony from Hodge seeking to show that the inconsistency was a result of Hodge's failure to have examined all of the evidence at the time he wrote the October 31, 1975 report.

Reviewing the record we can discern nothing in Fed. R. Evid. 613(b) that would serve as a basis for refusing to allow the defense to mention the dates of the inconsistent reports or to argue any inferences that could be drawn from these reports to the jury.

two alternatives, however, to the government's contention that the .223 casing was ejected into the trunk of Coler's car when the Wichita AR-15 was fired at the agents. One alternative is that the .223 casing was planted in the trunk of Coler's car either before its discovery by investigating agents or by the agents who reported its discovery. The other alternative is that a non-matching casing was originally found in the trunk and sent to the FBI laboratory, only to be replaced by a matching casing when the importance of a match with the Wichita AR-15 became evident. We are not convinced that either alternative is likely. The discovery of a .223 casing in the trunk of Coler's car was documented in a contemporaneous report. That report listed dozens of other items that were found in Coler's car on the same date. The detailed nature of that report makes

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it highly unlikely that it was fabricated. Not only is there no direct evidence that the .223 casing found in the trunk was replaced by another casing, the internal operating procedures of the FBI with respect to the preservation of evidence makes it unlikely that such replacement could occur without massive collusion. We recognize that there is evidence in this record of improper conduct on the part of some FBI agents, but we are reluctant to impute even further improprieties to them.

The AR-15.

We turn now to the question of whether the jury might have reached another result had it been able to consider the government's testimony with respect to the number of AR-15's on the compound on June 26, 1975, in light of the newly-discovered evidence just discussed. It was essential to the

government's case that it prove Peltier was in possession of the Wichita AR-15 on June 26th, and used that weapon to kill Coler and Williams. The government recognizes this fact in its brief.

> As a starting point in analyzing what the evidence produced at the hearing establishes one must first ascertain what is ultimately at issue concerning the match between Exhibits 34A [the Wichita AR-15] and 34B [the .223 casing found in the trunk of Coler's car]. What ultimately was proven by Special Agent Hodge's positive comparison of the extractor marks? *** [H]is conclusion only establishes that Exhibit 34B at some point in time was loaded into and extracted from Exhibit 34A. His conclusion does not establish directly that that shell casing was fired by that weapon. It, likewise, does not establish by itself any connection between either Exhibits 34A or 34B and Leonard Peltier. *** The match of the extractor marks between that shell casing and an AR-15 found in a burned vehicle on the Kansas Turnpike fairly conclusively established that point since there was no indication that either agent ever previously had access to that weapon. The inference which then arose, of course, was that since the agents received their final wounds as a result of close range fire in the area of Special Agent Coler's car, the shell casing

had been ejected into the trunk as a result of one of the final shots.

That inference standing alone, however, proved nothing concerning Leonard Peltier. He was not in the vehicle which exploded near Wichita and there was no direct evidence, such as fingerprints, which made a connection between he and the weapon. The only indirect connection between Peltier and the weapon was that it was in the custody of his friends and associates. The connection between Peltier and the Wichita AR-15, Exhibit 34A, rather, was established by the trial witnesses. The trial witnesses unanimously testified that there was only one AR-15 in the compound prior to the murders, that this weapon was used exclusively by Leonard Peltier and was carried out by him after the murders. The trial witnesses also testified unanimously that there was only one weapon which was seen firing at the agents that day which was capable of firing .223 ammunition and that this weapon was the AR-15 being utilized by Leonard Peltier. *** The necessary further inference, therefore, was that Leonard Peltier's weapon was fired down in the area where the two dead agents were found. while these inferences do not necessarily establish that Leonard Peltier personally fired any of the final killing shots, they do indicate very strongly that he was down by the bodies when the shot was fired. These inferences were, of course, strengthened by the trial testimony

> that Leonard Peltier was one of only three individuals seen down by the bodies that day.

Appellee's Brief pp. 30-32.

We turn first to the question of whether there was only one AR-15 on the compound on June 26. The answer to that question must be no. Hodge testified that among the one hundred and thirty--seven .223 casings found on the compound within a few days of the agents' deaths were fourteen that could not be identified as having been fired from the Wichita AR-15. Seven of these cartridges, Q100-Q105, and Q130 were found by special agent Hughes in the green house area. These cartridges were the very ones that were examined by Hodge by August 5, 1975, and were the subject of the October 2, and October 31, 1975, reports. The remaining seven, Q2513-2519, were found in Tent City, and

were the subject of Hodge's February 26th report. Tr. at 3323-34.

Notwithstanding the obvious error in the government's position, there are several reasons we have reservations as to whether the newly-discovered evidence probably would have caused the jury to reach a different result. First, the defendants knew at trial that fourteen .223 casings found on the compound did not match the Wichita AR-15. Hodge testified to that fact at trial. He even testified that he didn't know whether the fourteen had been extracted from the same weapon. The defendant, however, failed to emphasize this point in his closing argument.

Second, it is unlikely that the fourteen casings were extracted from an AR-15 during the fire fight with agents Coler and Williams. The green house and Tent City were physically located such

that it would have been very difficult, if not impossible, for anyone to have fired at Coler and Williams from these points. Thus, it is more likely that these casings were ejected from an AR-15 in the fire fight that occurred after Coler and Williams were killed and other agents had joined in the shooting.

Third, Norman Brown testified that he saw Peltier firing a weapon from the treeline similar to the one introduced into evidence: "Well, *** he was laying down and he'd get up and shoot, and then he'd lay back down and get up and shoot, and lay back down." Tr. at 1446. Michael Anderson testified that he saw Peltier at the agents' cars and that Peltier was carrying a weapon similar to the one introduced in evidence. Tr. at 788. Moreover, no witness testified that anyone other than Peltier was seen firing an AR-15 at the agents' cars, or that

anyone other than Peltier was seen by the agents' cars with an AR-15.

In the light of the full record, the jury might have given additional weight to the fact that there was more than one AR-15 on the compound on June 26 had the inconsistencies in the ballistic evidence introduced at trial been supplemented with the reports and data discovered after trial. Moreover, under such circumstances it might have given more serious consideration to the possibility that an AR-15 other than the Wichita AR-15 was used in the murder of either Coler or Williams,[7] but we cannot say that it is reasonably probable that it would have been sufficiently impressed by

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[7]We note that the defense did not, for reasons which are not apparent, stress in its cross-examinations or closing argument that there was more than one AR-15 on the compound on June 26.

these possibilities to have reached a different result at trial.

Conclusion.

There is a possibility that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case. Yet, we are bound by the Bagley test requiring that we be convinced, from a review of the entire record, that had the data and record withheld been made available, the jury probably would have reached a different result. We have not been so convinced.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-5192-ND

United States of America,

Appellee,

vs.

Leonard Peltier,

Appellant.

* * * * * * * * * * * * * * * * * *

Appeal from the United States
District Court for the
District of North Dakota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judge Fagg did not participate.

Petition for rehearing by the panel is also denied.

December 30, 1986

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-5192-ND

United States of America,

Appellee,

vs.

Leonard Peltier,

* * * * * * * * * * * * * * * * * *

Appeal from the United States
District Court for the
District of North Dakota

Appellant's petition for reconsideration of the denial of the petition for rehearing and suggestion for rehearing en banc has been considered by the Court and is denied.

Judge McMillian dissents from the denial of the petition for rehearing en banc and would grant the petition.

Judge Fagg did not participate.

March 23, 1987

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, United States Court of Appeal,
Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

United States of America,

Plaintiff,

v.

Leonard Peltier,

Defendant.

Cr. No. C77-3003

MEMORANDUM AND ORDER

On April 18, 1977, a jury found Leonard Peltier guilty on two counts of first degree murder for his participation in the urder of two FBI agents on the Pine Ridge Indian Reservation in South Dakota, in violation of 18 U.S.C. §§ 2, 1111, 1114. The court of appeals affirmed the judgment of conviction on direct appeal. United States v. Peltier, 586 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

On April 20, 1982, Peltier filed a motion to vacate the judgment and for a new trial pursuant to 28 U.S.C. §2255. This court denied the motion on December 30, 1982, without holding an evidentiary hearing. United States v. Peltier, 553 F.Supp. 890 (D.N.D. 1982). On appeal the court of appeals remanded for an evidentiary limited to this court's consideration of testimony or documentary evidence relevant to the meaning of an October 2, 1975, FBI teletype, and its relation to the ballistics evidence introduced at Peltier's trial. United States v. Peltier, 731 F.2d 550, 555 (8th Cir. 1984).[8] The court of appeals directed this court to rule on whether

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[8]Defendant became aware of the existence of the teletype through a Freedom of Inforation Act action following his conviction.

the evidence adduced at the hearing supports Peltier's contention that the government's nondisclosure of the October 2, 1975, teletype violated Peltier's due process rights under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), requiring a new trial. 731 F.2d at 555.

The mandated evidentiary hearing commenced before this court on October 1, 1984. The matter became at issue on May 10, 1985. FBI Special Agent Evan Hodge, the author of the October 2, 1975, teletype and presently the chief of the FBI Laboratory's Firearms and Tool Marks Division, was the only witness who testified at the hearing.[9] Hodge's testimony related to the procedures

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[9]Defendant had an independent firearms expert present in the courtroom at the hearing, but he was not called to testify.

utilized by the FBI lab in processing the "reservation murders" (referred to as "RESMURS") evidence and the examinations that resulted in the October 2, 1975, FBI teletype.

The October 2, 1975, teletype reads in pertinent part:

> RECOVERED .223 CALIBER COLT RIFLE RECEIVED FROM SA _____ BATF, CONTAINS DIFFERENT FIRING PIN THAN THAT IN RIFLE USED AT RESMURS SCENE.

At trial the government, through independent evidence, linked an AR-15 .223 caliber Colt rifle, found later in an exploded car on a Wichita turnpike, as one that was in the possession of Peltier on the day of the murders. FBI Special Agent Evan Hodge testified at trial that a .223 bullet casing found in the trunk of Agent Coler's, one of the dead agents, car was positiviely identified by the extractor marks on the casing as having been extracted from the Wichita AR-15.

Peltier argued in his motion to vacate judgment and for a new trial and on appeal of this court's denial of his motion, that the October 2 teletype meant the bullet casings found "at RESMURS scene," which Peltier argued included the .223 casing found in the trunk of Agent Coler's car, had been tested against the Wichita AR-15 with negative results. Such results would have discredited Agent Hodge's testimony at trial that no conclusion could be reached from a firing pin analysis of the Wichita AR-15 in relation to the alleged fatal bullets, and would have seriously undermined the ifnerence, which the government urged the jury to draw from the positive extractor mark testimony given by Agent Hodge, that the Wichita AR-15 in fact fired the fatal bullets.

In the December 30, 1982, memorandum and order of this court, the court

rejected Peltier's argument and held the October, 21975, teletype did not raise a question that was not presented to the jury at trial. 553 F.Supp. at 896. The basis for this holding was the conclusion that the October 2 teletype raised no more of an inconsistency with the February 10, 1976, lab report (Trial Ex. 192), which summarized the positive extractor evidence concerning the .223 casing found in Agent Coler's trunk, than the October 31, 1975 lab report (Trial Ex. 135), of which the government contends the October 2, 1975 teletype was an advance version and which was before the jury. Id. The court of appeals agreed with this court's ruling on Peltier's argument that a firing pin test done on the .223 casing found in the trunk of Agent Coler's car (Trial Ex. 34B) and the Wichita AR-15 (Trial Ex. 34A) was done before October 2, 1975, and

proved negative. 731 F.2d at 554. The appellate court noted, however, that the interpretation of the trial court and Peltier was not the only one that could be drawn from the October 2 teletype. Id. The court stated, "Indeed, if this were the only interpretation which could be drawn, then that discrepancy had already been put before the jury and we find no need for further consideration of the issue." Id.

The Eighth Circuit expressed its concerns about other possible interpretations of the October 2 teletype as follows:

> The teletyle does not simply say that the firing test pin came up negative, however--it says that the AR-15 "contains [a] different firing pin than that in [the] rifle used at [the] RESMURS scene." [Emphasis added.] This language raises several possibilities not considered by the district court and not as readily explained away by the record as it presently exists. For example, the use of the word "different" could indicate that the

> FBI knew the firing pin in the damaged AR-15 had been changed after June 26, 1975, murders. Such a discrepancy can be found nowhere else in the record, and could raise questions regarding the truth and accuracy of Hodge's testimony regarding his inability to reach a "conclusion" on the firing pin analysis and his positive conclusion regarding the extractor markings.
>
> We do not mean to imply that the October 2 teletype establishes that the motives or actions of any FBI agent or government prosecutor were improper. Further investigation into this matter may simply show that the use of the word "different" in the teletype was an inaccurate way of expressing exactly what the October 31 laboratory report said--that the AR-15 could not be positively matched with any of the casings which had been tested at that time based on firing pin comparisons. We think it inappropriate, however, to simply assume this resolution of the new discrepancy raised by the October 2 teletype without hard evidence one way or the other.

Id.

The government contends the October 2 teletype was an advance version of a laboratory report authored by Hodge dated October 31, 1975, and received in

evidence at Peltier's trial as Defendant's Exhibit 135. The government contends none of the trial exhibit 34 series of shell casings, which included the .223 casing found in the trunk of Agent Coler's car (Q# 2628, Trial Ex. 34B), had been examined at the time either the October 2, 1975, teletype or the October 31, 1975, lab report was written. Only seven .223 casings identified in the FBI lab by Q numbers 100 through 105 and 130 had been examined by that time, and it was the results of these seven comparisons that formed the basis for Agent Hodge's conclusion in the October 2 teletype. Due to a distinctive mark on the primer of those seven .223 casings, Hodge determined they had not been fired by the AR-15 recovered in Wichita, identified in the lab as K-40 (Trial Ex. 34A), thus accounting for the wording "contains different firing pin"

in the teletype. At some time later during the course of his examinations, Agent Hodge compared the .223 casing from the tunk of Agent Coler's car (Q# 2628, Trial Ex. 34B) and determined it had been loaded into and extracted from the Wichita AR-15.

Peltier contends the October 2, 1975, teletype was referring to all the .223 casings recovered during the RESMURS investigation instead of merely the seven .223 casings urged iby the government. As such, Peltier contends Agent Hodge perjured himself or intentionally misled the jury when he testified at Peltier's trial he was not able to reach a conclusion based upon the comparison of the firing pin impressions on the test specimens fired with the firing pin of the Wichita AR-15 and the .223 casing found in the trunk of Agent Coler's car. According to Peltier, the October 2

teletype brings into question the truth of Agent Hodge's testimony linking the .223 casing found in the trunk of Agent Coler's car to the Wichita AR-15.

Findings of Fact

From the testimony of Agent Hodge and the documents received in evidence at the evidentiary hearing and documents filed with the court, the court finds the following facts.

At the time of the RESMURS investigation in 1975 and 1976, Evan Hodge was an FBI laboratory firearms and tool marks examiner. As a firearms and tool marks examiner he received evidence sent to him by field agents, examined it to determine whether ammunition components had been fired from a particular firearm to the exclusion of all others, and reported his findings. At the hearing Agent Hodge described the FBI laboratory's handling of the .223

casing found in the trunk of Agent Coler's car (Trial Ex. 34B, Q# 2628) from the time it entered his hands in July 1975 until the final firearms comparisons were made in February 1976.

The Wichita AR-15 rifle and the .223 casing found in the trunk of Agent Coler's car were both part of the government's exhibit 34 series at trial. The items that compose the exhibit 34 seies were received by the FBI laboratory and Agent Hodge in three different submissions. The first submission, containing several hundred shell casings, was received by Hodge on July 5, 1975, from FBI Agents Cunningham and Fluharty. This submission included trial exhibits 34C, bullet casings from the 1976 Ford Galaxy (Q numbers 353, 356-377, and 399-410); 34D, the bullet casing from the 1966 Chevrolet Suburban (Q# 547); 34G, bullet fragments from Williams car (Q

numbers 10, 15A, 15C, and 18); and 34H, the bullet fragment from the ground beneath the bodies of Williams and Coler (Q# 84). When received by Hodge, the items were in random order in paper or plastic bags and were accompanied by Agent Dean Howard Hughes's "green sheet" (Evid. Hrg. Ex. 9). The "green sheet" contained a description of each piece of evidence found by Hughes and indicated the items were found in the vicinity of the green house, Jumping Bull Hall area. The items in the first submission were cataloged by Hodge and Joseph Twardowski, his assistant, assigned Q and K numbers, and listed on Hodge's workheet for a secretaryd to type the following day. The assigned Q numbers also were written on the "green sheet" that accompanied the evidence. The information contained on the worksheet included a list of the items received, the case number, when

they received, and the name of the person from whom they were received. The worksheet was used for inventory control purposes and was the first shset of an examiner's laboratory notes. The information on the work sheet also was contained in the examiner's final lab report.

Q numbers from 1 through 1102 were assigned to items in the first submission. Hodge was provided with no information regarding the items found by Hughes other than that contained in the "green sheet." The items were grouped and Q numbers assigned on the basis of where they were recovered, in what Hodge considered to be a logical order. Those recovered from Agents Williams and Coler's bodies were listed first, followed by the specimens found in their vehicles, the Dean Howard Hughes items, items from Tent City, and then items from

other vehicles. The items received in the first submission were stored in Hodge's evidence cabinet until they were examined.

To avoid confusion, it is Hodge's ordinary practice to examine evidence in numerical order by Q number. He will deviate from this procedure and make exceptions when priority requests are brought to his attention by field agents. When an item of evidence is given priority treatment, it is because he has received a priority request by telephone, teletyle, or airtel addressed to the laboratory and/or the general investigative division. Field agents often ask to have their lab work done first and Hodge is constantly asked for expedited reports. These routine urgings will cause Hodge to change the order of his examinations only when there is some urgency for the results. Examples of

what Hodge consider urgent are evidence involved in cases going to trial soon and examinations needed to obtain a warrant or to keep an individual in custody.

Hodge's examination of the items received in the first submission commenced on July 6 or 7, 1975. Beginning with Q numbrs 1 through 219, he compared the ammunition compoents with the firearms he had received. Hodge's findings with regard to these initial examinations were reported in a lab report dated August 5, 1975 (Trial Ex. 134; Evid. Hrg. Ex. 10). the last item examined in preparation of the August 5 report was Q# 219. Examination of the remainder of the items in the first submission was not completed until January 1976. Although the .223 casing from the trunk of Agent Coler's trunk (Q# 2628) had been received by the date of

the August 5, 1975, report, it was not listed in the August 5 report.

The second submission, containing approximately 800 items, was received by Hodge from Rapid City on July 24, 1975. This submission included trial exhibits 34B, the bullet casing from the trunk of Coler's car (Q# 2628); 34E, the bullet casing from the loghouse near the crime scene (Q# 2536), and 34F, the bullet casing from the hood and top of the 1967 Ford at Tent City (Q# 2539). Hodge followed the same pre-examination procedure with the items in the second submission as he had with those in the first submission. The items were investoried and listed, Q numbers were assigned, the worksheets were typed up, and the items were stored in the evidence cabinet until examined.

When the bullet casing found in the trunk of Agent Coler's car was received

iwht the other items in thesecond submission, no special attention was drawn to it by the field agents, and Hodge was not asked to give it priority treatment. Therefore, Hodge listed it during the ordinary course of listing the second submission items and assigned it Q# 2628. In examining the items in the second submission, Hodge generally followed his procedure of numerical examination by Q number, resulting in examination Q# 2628 in December 1975 or January 1976. The .223 casing from the trunk of Agent Coler's car (Q# 2628) was not listed in a lab report until February 10, 1976.

The third submission, containing several firearms, was received by Hodge from Special Agnet Mike Gammage, Bureau of Alcohol, Tobacco, and Firearms, on September 12, 1975. The weapons had been recovered by agents of the Bureau of

Alcohol, Tobacco, and Firearms from a vehicle that had exploded near Wichita, Kansas. This submission included trial exhibit 34A, the .223 Remington Colt AR-15 rifle (identified in the FBI lab as K-40).

As of September 12, 1975, Hodge had received all the items of evidence contained in the exhibit 34 series. Due to numerous interruptions during the course of the RESMURS investigaiton, however, as of September 12, 1975, he had only examined the items in the first submission Q numbered 1 through 219. Interruptions included one day that Hodge was required to testify during the course of his examination of the items Q numbered 1 through 219, 12 testimony trips requiring a total of 23 days between August 1975 and February 1976, a five and one-half day trip to teach a class at the FBI training center in

August 1975, and trips to Florida, New York, Texas, Nebraska in September 1975, which required a total of 16 days. Additionally, Hodge received seven non-RESMURS submissions, containing approximately 6000 items, between July 5, 1975, the date of the first RESMURS submission, and July 24, 1975, the date of the second RESMURS submission. Hodge issued 17 formal non-RESMURS reports based upon his examination of these items between August 1975 and February 1976.

Because he had only examined items Q numbered 1 through 219 as of September 12, 1975, Hodge initially examined the Wichita AR-15 exemplars with only the seven .223 caliber (5.56mm) bullet casings among these items, Q numbers 100 through 105 and 130. Hodge testified the examination of cartridge cases is time consuming. It takes approximately two hours to do an initial, simple,

one-shell, one-gun examination. In conducting his examinations, Hodge first examining the bullet casings to determine the caliber and manufacturer. He then examined the firearm to determine if there were residues and if it was in good working order and could be test fired. Then there are several comparisons to be made of the firing pin impressions, the breech face markings, the extractor markings, and in some cases, the ejector markings. All of these comparisons are done in one examination, and it would be very unusual to do them at different times.

The sequence of the mark comparisons varies from examiner to examiner. Hodge looks at the firing pin impression, primer, and breech face marks first. If these marks are not sufficient for identification, he looks at the ejector and extractor marks.

The Wichita AR-15, identified in the lab as K-40 (Trial Ex. 34A), had been badly burned in the fire and was not in firing condition when received by Hodge. It was charred, the plastic stock and handguard had melted away, and some of the aluminum parts had melted. Hodge, therefore, did not attempt to test fire the gun itself. Instead, he took the bolt out of the receiver and placed it in an FBI collection Ar-15 firearm (M-22) that had no connection with the RESMURS investigation. He did not dissemble the bolt, or in any manipulate the firing pin. Although it had been through a fire, there was nothing about the Wichita AR-15 bolt that would lead Hodge to suspect the firing pin had been changed. Hodge test fired the M-22 rifle containing the Wichita AR-15 bolt twice and recovered the test specimen bullet casings, or exemplars.

Based upon a comparison of the microscopic marks on the exemplars and investigation specimens made by the firing pin, breech face, ejector, and extractor, Hodge could reach one of three possible conclusions: the specimen was loaded into, fired, ejected, or extracted from the weapon (a positive identification); the specimen was not loaded into, fired, ejected, or extracted from the weapon (a negative identification); or it is impossible to determine whether the specimen was loaded into, fired, ejected, or extracted from the weapon (a non-conclusion).

Hodge's examination of the firing pin and extractor marks on the Wichita AR-15 exemplars and the Q numbered 100 through 105 and 130 bullet casings resulted in a negative identification, as noted in the FBI lab worksheet dated September 12, 1975 (Evid. Hrg. Ex. 7).

Hodge testified at the hearing that the firing pin in the Wichita AR-15 bolt was smooth, whereas the firing pin impression on the seven .223 casings he had tested had a cross imperfection and was very distinctive. It was on this basis Hodge could tell the firing pin in the gun that had fired these seven casings was different than the firing pin of the Wichita AR-15 (K-40).

Although he failed to specify by Q number the casings covered by the October 2, 1975, teletype, Hodge testified it was the results of the comparisons of Q numbers 100 through 105 and 130 and the Wichita AR-15 exemplars that he had preliminarily reported in the October 2, 1975, teletype (Evid. Hrg. Ex. 4). No .223 casings other than Q numbers 100 through 105 and 140 had been compared against the Wichta AR1-15 exemplars as of October 2, 1975. The term "RESMURS

scene" used in the October 2 teletype was a shorthand term by which Hodge meant to refer only to the Q numbers below Q# 219 listed in the August 5, 1975, lab report, which lab report was specifically referenced in the October 2 teletype. At the time of the October 2 teletype Hodge thought the shell casings listed in the August 5, 1975, lab report with Q numbers below Q# 219 were the casings located closest to the actual murder scene. There were only seven .223 (5.56mm) casings in that category of the August 5 lab report, those casings being Q numbers 100 through 105 and 130.

Due to the characteristic cross imperfection left by the firing pin in the weapon used to fire these seven casings, and the uncharacteristic smooth impression left on his exemplars by the firing pin in the Wichita AR-15, Hodge reported in the October 2, 1975, teletype

that the Wichita AR-15 contained a "different firing pin" than that in the rifle used at the RESMURS scene. The term "different firing pin" in the teletype means the firing pin that made the impressions on Q numbers 100 through 105 and 130 was a different firing pin than the one that made the impressions on the Wichita AR-15 exemplars.

The October 2, 1975, teletype was followed by a formal lab report dated October 31, 1975, which was introducted at trial as Defendant's Exhibit 135. There were no other examinations pertaining to the Wichita AR-15 between the October 2 teletype and the October 31 lab report. In the October 31 report the term "RESMURS scene" was meant to refer only to the seven .223 casings Q numbered 100 through 105 and 130.

After comparing the Q numbered 100 through 105 and 130 bullet casings with

the Wichita AR-15 exemplars, Hodge returned the Wichita AR-15 (K-40) to the Bureau of Alcohol, Tobacco, and Firearms, but retained the exemplars he had made, placing them in the file for future use as needed.

Later examinations of the remaining .223 bullet casings submitted in connection with the RESMURS case resulted in approximately 114 positive identifications with the Wichita AR-15. Thirty-none of these were introduced into evidence at Peltier's trial as part of the exhibit 34 series. One of these was the bullet casing found in the trunk of Agent Coler's car (Q# 2628; Trial Ex. 34B). Hodge examined this bullet casing in December 1975 or January 1976. He was not able to reach either a positive or negative conclusion based upon a comparison of the firing pin impressions on Q# 2628 and the Wichita AR-15

exemplars, because he was not able to identify a sufficient number of characteristics in the firing pin impression left on the exemplars. The extractor marks on the exhibit 34 series and the Wichita AR-15 exemplars were very characteristic due to their depth and roughness, however, and Hodge was able to conclude the extractor marks on the exhibit 34 series had been made by the Wichita AR-15 to the exclusion of all other weapons. The examinations of the firing pin impressions on the 114 castings did not produce any evidence inconsistent with the theory that the castings, and particularly the exhibit 34 series, had been fired from the Wichita AR-15. Hodge reported his findings with regard to the exhibit 34 series bullet castings in his January 13, 1976, (Evid. Hrg. Ex. 2) and February 10, 1976, (Evid.

Hrg. Ex. 3; Trial Ex. 192) laboratory reports.

Because all the items contained in the exhibit 34 series, including 34B, were in Hodge's possession on October 2, 1975, Peltier's counsel attempted to demonstrate on cross-examination that the October 2 teletype covered those items as well. Peltier argues, without evidence to support the argument, that even if all the ammunition components in the first and second submissions had not beeen examined prior to October 2, Hodge had examined the .223 caliber components out of order due to either specific requests he had received from the field or his knowledge of the RESMURS investigation.

The documents received in evidence at the evidentiary hearing corroborate Hodge's testimony with regard to the meaning of the October 2 teletype. The October 2 teletype refers to Hodge's

August 5, 1975, lab report. A number of .223 caliber (5.56 mm) bullet castings are listed in the August 5 lab report, but only the .223 castings with Q numbers 100 through 105 and 130 are listed under the heading "at scene." Documents filed with the court show Hodge and his assistant were consistent with the use of the term "RESMURS scene" to describe only Q numbers 84 through 219. Evid. Hrg. Ex. 22; 33 at pages 294, 307; 27 at pages 5,6.

Hodge did not complete his examination of the RESMURS evidence until approximately nine months after the incident occurred due to the volume of RESMURS evidence received by him and his work on otehr cases, some of which were RESMURS related. Priority requests received in connection with items of RESMURS evidence interrupted Hodge's ordinary procedure of examining evidence

in numerical sequence by Q number. Hodge received special requests to compare all .223 castings with the AR-15 found at Al Running's on September 11, 1975, (Evid. Hrg. Ex. 6), to examine a .32 caliber Harrington and Richardson 5 shot revolver (Evid. Hrg. Ex. 17), to compare the Portland AR-15 and 35 Remington semi-automatic Woods Master with the expended cartridge cases discovered during the RESMURS investigation (Evid. Hrg. Ex. 23), and to compare all .308 cartridge cases found at RESMURS scene with a .308 Winchester caliber Remington Model 760 carbine found in the vehicle that exploded on the Kansas Turnpike (Evid. Hrg. Ex. 32). Additionally, Hodge received a number of more general requests. See Evid. Hrg. Ex. 14, 19, 28, 29, and 35. Hodge specifically responded to some of these requests. For example, the October 2 teletype (Evid. Hrg. Ex. 4)

was primarily concerned with the results of his examination of a .308 caliber rifle recovered from the Wichita explosion, and a November 24, 1975, teletype (Evid. Hrg. Ex. 22) reported the results of his comparison of an AR-15 from Portland, Oregon, with shell casings Q numbered 100 through 105 and 130, because, at the time, that was as far as his examinations had progressed. Hodge responded to many of the requests, however, by way of his laboratory reports.

Hodge never received a specific priority request to examine the .223 casing found in the trunk of Agent Coler's car (Q# 2628). Therefore, it was examined in the ordinary course of his work. He did, however, receive a specific request to compare the AR-15 from Wichita with Q numbers 356 through 377 (Evid. Hrg. Ex. 32). This request

was not formally answered until Hodge issued his January 13, 1976, lab report. His reponse to this response to this request was not contained, as defense counsel suggested, in the October 2, 1975, teletype.

Peltier argues Hodge had much information regarding the RESMURS investigation available to him, the knowledge of which caused him to examine all the .223 caliber ammunition components, including Q# 2628, and the aR-15 rifles he had received prior to October 2, 1975. The information available to Hodge included the following: a teletype dated June 27, 1975, indicating the pathologist's opinion that the agents were shot at point blank range with a high velocity shoulder weapon (Evid. Hrg. Ex. 13); a summary teletype dated September 20, 1975, indicating that suspect Al Running

advised the FBI that the Wichita AR-15 was probably used by Leonard Peltier to kill the agents (Evid. Hrg. Ex. 14); a teletype dated July 10, 1975, indicating that one of at least five different weapons used on Agent William's car was a .22 center fire caliber (Evid. Hrg. Ex. 16); and a teletype and memorandum, both dated September 24, 1975, indicating suspect Norman Brown saw Leonard Peltier, armed with an AR-15 or M-16, approach the agents with two other Indian men and then heard three shots (Evid. Hrg. Ex. 30 and 31).

Although Hodge was aware of the information regarding the investigation from Rapid City, the autopsy findings, and the fact that three AR-15's were possibly involved, this knowledge did not cause him to deviate from his general procedure of examining evidence numerically by Q number. Hodge was a

firearms and tool marks examiner in the laboratory, not a field investigator. It was his job to analyze the evidence submitted to him in a careful, logical manner. The locations of the items submitted to him when found was irrelevant in his work, except as a means of grouping and identifying them in assigning Q numbers and writing his laboratory reports. Determinations regarding the evidentiary value of specific items were left to the field agents and government attorneys. Hodge knew all the evidence would eventually be examined, because no specific priority request was received from the field with regard to Q# 2628, he examined it during the ordinary course of his lab work. The items submitted to the lab were, in a sense, all priority items, but it was not possible for him to examine them all immediately. Therefore, he examined the

items the field agents designated as priority items first, and the remainder of the items as soon as he was able to get to them.

During the course of his examinations, Hodge was assisted by three laboratory personnel, Special Agents Twardowski, Albrecht, and Reidman. Hodge testified on cross-examination that the handwriting on his lab notes (Evid.Hrg.Ex.33) concerning Q# 2628 was either his or that of his assistant Special Agent Twardowski. After the evidentiary hearing was initially closed, Agent Twardowski stated to Hodge that some of the writing was not his, and the evidentiary hearing was reopened. Hodge then recanted his earlier testimony, but he was unable to provide the court with the name of the person who had actually made the notes. Hodge did reaffirm at the reopened hearing that regardless of

whose handwriting was contained in his notes, the conclusion stated in the report was based on his personal examination of Q# 2628 and the Wichita AR-15 exemplars. This rebuts any inference that the laboratory results with regard to the exhibit 34 series had been fabricated to wrongly convict Leonard Peltier.

The deposition of Special Agent William Albrecht was taken in Washington, D.C., on January 7, 1985. Agent Albrecht testified he made the lab notes concerning Q# 2628 on page 417 of Evidentiary Hearing Exhibit 33. Albrecht testified he did not make the notations on the photographic exemplar, which appear on page of 418 of Exhibit 33. Hodge had testified at the evidentiary hearing that he made the note on the photographic comparison himself. At the time Albrecht made htese notes he was not

a qualified firearms examiner, but rather an agent trainee. He had started with the FBI lab on October 29, 1975. As such, while Albrecht's preliminary findings in the lab notes concerning Q# 2628 are consistent with the conclusions in the February 10, 1976, lab report, the conclusion in the lab report are not Albrecht's, but rather, Hodge's. In addition, since Albrecht did not start working in the lab until October 29, 1975, Albrecht's notes concerning Q# 2628 could not have been written, and his examination of Q# 2628 was not done, before the time of the October 2, 1975, teletype at issue.

After having seen and heard Agent Hodge testify, it is the opinion of this court that Agent Hodge was a credible witness. The fact the hearing was reopened so that he could correct an error he had made in his earlier

testimony adds to, rather than detracts from, his credibility.

From the testimony of Agent Hodge this court finds the meaning of the October 2, 1975, teletype to be as follows: The Wichita AR-15 (Trial Ex. 34A) contains an uncharacteristic smooth firing pin, whereas the weapon used to fire the Q numbered 100 through 105 and 130 bullet casings contains a different firing pin, with a characteristic cross imperfection. Therefore, the Wichita AR-15 could not be positively identified with any of the .223 bullet casings that had been tested as of October 2, 1975, those being the casings Q numbered 100 through 105 and 130, based on firing pin comparisons.

Conclusions Of Law

At the close of the evidentiary hearing, Peltier's counsel took the position he could not be barred from

relitigating issues previously raised and decided adverse to him on appeal. This argument is iwthout merit. See Anderson v. United States, 619 F.2d 772, 773 (8th Cir. 1980). In addition, Peltier's other alleged Jencks Act violations and rule 16 violations have not been shown to be Brady violations, infringements of constitutional rights, or defects seriously affecting the fairness of the trial, and thus, cannot be raised in habeas corpus proceedings; they could be raised only on direct appeal. See United States v. Houser, 508 F.2d 509 (8th Cir. 1974).

The evidentiary hearing in this case was held pursuant to the mandate of the Eight Circuit Court of Appeals. The mandate remanded the case to this court for an evidentiary hearing specifically limited to consideration of testimony or documentary evidence relevant to the

meaning of the October 2, 1975, teletype and its relation to the ballistics evidence introduced at Peltier's trial. Therefore, the court will only consider the issues raised and evidence presented at the evidentiary hearing relevant to the meaning of the October 2 teletype.

After his appeal of this court's December 30, 1982, order denying his motion to vacate judgment and for a new trial, Peltier's remaining section 2255 claim is that the failure of the United States to provide him with a copy of the October 2, 1975, teletype prior to his criminal trial denied him due process protected by the fifth amendment to the United States Constitution. See Brady v. Maryland, 373 U.S. 83 (1963). Whether the government's nondisclosure requires reversal depends upon the nature of the material and the specificity of defense requests for disclosure. If the

undisclosed evidence demonstrates that the government's case included perjured testimony and that the prosecution knew or should have known of the perjury, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). In the absence of perjured testimony, if a specific request for evidence was made by the defense, but the exculpatory evidence was not given, the conviction must be overturned if "the suppressed evidence might have affected the outcome of the trial." Id. at 104. If no request, or merely a general request for exculpatory evidence was made, nondisclosure will constitute constitutional error only if "the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112.

Agent Hodge testified at Peltier's trial that he could not make a conclusive firing pin comparison between teh Wichita AR-15 exemplars and the bullet casing found in the trunk of Agent Coler's car. Trial Transcript at 3234-35. It became apparent at the evidentiary hearing the reason for this was the firing pin in the bolt of the Wichita AR-15 was smooth and did not produce a sufficient number of characteristic marks on the exemplars for Hodge to be able to say the Wichita AR-15 had or had not fired the bullet casing found in the trunk of Agent Coler's car to the exclusion of all other weapons. In addition, the firing pin impression on the bullet casing found in the trunk of Agent Coler's car did not contain any unusual marks so that Hodge could conclude it had not been fired from the Wichita AR-15. The .223 bullet casings considered by Hodge to have been found

"at the scene" and tested prior to October 2, 1975, were those with Q numbers 100 through 105 and 130. The firing pin impressions on those seven bullet casings did contain an unusual mark not found on the Wichita AR-15 exemplars. Therefore, Hodge was able to determine the Wichita AR-15 had not fired the casings Q numbered 100 through 105 and 130, even though the firing pin impression left on the Wichita AR-15 exemplars did not contain a sufficient number of characteristic marks.

On the basis of the foregoing, it is clear the October 2, 1975, teletype does not evince perjured testimony. The October 2, 1975, teletype only dealt with the results obtained by Hodge after comparing the firing pin impressions on the Wichita AR-15 exemplars with the firing pin impressions on bullet basings Q numbered 100 through 105 and 130. A

comparison of the firing pin impression on the Wichita AR-15 exemplars and the .223 casing found in the trunk of Agent Coler;s car (Q# 2628) at a later date merely produced an inconclusive result, not a negative one. The extractor marks left on both the Wichita AR-15 exemplars and Q# 2628 were very characteristic due to their depth and roughness, adn therefore, it was possible for Hodge to conclude the extractor marks on Q# 2628 had been made by the Wichita AR-15 to the exclusion of all other weapons.

In cases not involving the use of perjured testimony, the issue of whether the undisclosed evidence is sufficiently material to require its disclosrue is determined by initially considering whether the defense made a specific or general request for its disclosure prior to trial. Applying either the specific or general request standards of

materiality to the October 2, 1975, teletype, it is the opinion of this court that Peltier is not entitled to a new trial. The evidence produced at the evidentiary hearing established that the use of the word "different' in the October 2, 1975, teletype was merely an inaccurate way of expressing what the October 31, 1975, laboratory report (Trial Ex. 135) also meant to express--that the Wichita AR-15 could not be associated with any of the bullet casings that had been tested at that time based on firing pin comparisons. Therefore, the October 2, 1975, teletype can be considered preliminary information, which the prosecution had no obligation to disclose to the defendant. Giles v. Maryland, 386 U.S. 66, 98 (1967).

In addition, the October 2 teletype is merely cumulative in relation to the

evidence produced at Peltier's trial. The October 31, 1975, lab report, which had a meaning identical to the October 2, 1975, teletype in its statement that "none of the ammunition components recovered at the RESMURS scene could be associated" with the Wichita AR-15, was introduced in evidence at the trial, as Defendant's Exhibit 135. A February 10, 1976, lab report stating that the .223 bullet casing found in the trunk of Agent Coler's car had been associated with the Wichita AR-15 was also admitted at trial, as Defendant's Exhibit 192. Agent Hodge testified at trial he did not examine the .223 bullet casing found in the trunk of Agen Coler's car until December 1975 or January 1976, thus explaining the discrepancy between the two reports. Trial Transcript at 3388. Therefore, the evidence at trial included the apparently inconsistent lab reports and Agent

Hodge's testimony concerning the time he examined the .223 casing found in the trunk of Agent Coler's car for the jury's consideration.

Because the October 2, 1975, teletype, evaluated in the context of the entire record, would not have affected the outcome of the trial, and does not create a reasonable doubt that did not otherwise exist, Peltier has failed to establish constitutional error. The nondisclosure of the teletype did not violate the Brady doctrine. The record of the case as it presently exists conclusively shows Peltier is entitled to no relief.

Dated this 22nd dat of May, 1985

/s/ Paul Benson

Chief Judge,

United States District Court

SUPREME COURT OF THE UNITED STATES

No. A-690

LEONARD PELTIER,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 29 May, 1987.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 25th
day of March, 1987

SUPREME COURT OF THE UNITED STATES

No. A-840

LEONARD PELTIER,

Petitioner

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the application for leave to file the petition for writ of certiorari in excess of the page limitation is granted provided that the petition does not exceed fifty (50) pages.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 20th day of May, 1987.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

LEONARD PELTIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 77-1487

EXCERPTS FROM ARGUMENT

FROM MAGNETIC TAPE

April 12, 1978

APPELANTS ARGUMENT

THE COURT: Mr. Hultman.

MR. HULTMAN: Your Honor, may it please the court. Your Honor, since the last issueing is freshest in your memory and because a question was asked, or two, I would like to address the issue concerning Myrtle Poor Bear first, and then go to some of Mr. Kunstler's remarks.

So that Your Honor will know the posture in which Myrtle Poor Bear appears, I would refer you to Page 24 and 25 and 26 of the Government's brief. And in response, Judge Stevenson, I believe it was to your question, as we point out there, and the things I'm about to say are documented at the record at the pages in our brief, the Government's

The counsel for Mr. Peltier in opening statement spoke of one witness in the trial that was about to proceed, and that was Myrtle Poor Bear. As he later specifically said during the court of the trial and at the opening statement, he said, as we have indicated to you on the page in the record, that in his opening statement that the Government was going to bring a witness whose mental--I'm quoting the record now--"a witness whose mental imbalance is so gross as to render her, her testimony, unbelievable,"

unquote. Now that was the posture that defense counsel placed this witness in in opening statement. And I submit to you that that was a correct statement without any question. And the record from that point on, likewise, will make that statement of defense counsel's in opening statement correct.

Both of the defense attorneys referred to her at Page 1464 of the record as being unstable when applying for a material witness warrant. Now, this is a second time, officially, in the record when they wanted to get a material witness warrant that they characterized this particular witness. Now, the government didn't call her very simply, and I made that decision myself.

JUDGE ROSS: And they were subpoening her?

MR. HULTMAN: That is correct, Your Honor, that is correct. And that's

found on page 1464 of the record, Your Honor.

JUDGE ROSS: Assuming that she was incompetent, what about the affidavit that they utilized in the extradition proceedings?

MR. HULTMAN: All right, Your Honor. When the -- To go back in time frame, Your Honor, so that maybe I can better explain that, these affidavits were in the early part of the year, in January, February. I don't remember the exact dates, but the dates were on the affidavits themselves. And at that time that was all that was known by anybody concerning Myrtle Poor Bear. And I can stand before this court and say that that is the only thing that the prosecutor, because I was the representative for the Government, that was the only thing of which I had any knowledge of any kind. So the affidavits were accepted on their

face as being statement of a witness who was present who was present who was testifying in the affidavit under oath as to what it was she saw.

JUDGE ROSS: But anybody who read those affidavits would know that they contradict each other. And why the FBI and Prosecutor's office continued to extract more to put into the affidavits in hope to get Mr. Peltier bac to the United States is beyond my understanding.

MR. HULTMAN: Yes.

JUDGE ROSS: Because you should have know, and the FBI should have known that you were pressuring the woman to add to her statement.

MR. HULTMAN: Your Honor, I personally was not present at that stage. I read the affidavits after they had been submitted, so I want this court to know that.

JUDGE ROSS: The Government --

MR. HULTMAN: And I don't excuse, by my remark just now to Your Honor, I don't in any way excuse what the court has just indicated. Your Honor, I have trouble with that myself, and Your Honor that is the exact reason which I did read these affidavits and put together the fact that -- And that gets to the second point, Judge Gibson and Judge Ross. It was clear to me her story didn't later check out with anything in the record by any other witness in any other way. So I concluded then, in addition to her incompetence, first, that secondly, there was no relevance of any kind. Absolutely not one scentilla of any evidence of any kind that had anything to do with this case. And it was then that I personally made the decision that this witness was no witness. First of all, because she was incompetent in the utter, utter, utter

ultimate sense of incompetency as recognized by defense counsel on more than one occasion. And there was some more indicia here in the record where they likewise further did. But, secondly, as Judge Ross, you are indicating, and I take no issue at that, Your Honor, but when I then tested those statements once they came to me, and that was after they had gone to Canada, and I had a chance to look at them and tested them with all of the record, all of the witnesses, there was not one scentilla that showed Myrtle Poor Bear was there, knew anything, did anything, et cetera. And so, it is for those two reasons that I believe the court, very realistically, and very fairly, and in the tla interest of justice determined for the reasons that the court then gave, that Myrtle Poor Bear's testimony would go totally to

a collateral matter, even if it were a collateral matter with some relevence.

JUDGE ROSS: But can't you see, Mr. Hultman, what happened happened in such a way that it gives some credence to the claim of the --

MR. HULTMAN: I understand, yes, Your Honor.

JUDGE ROSS: --the indian people that the United States is willing to resort to any tactic in order to bring somebody back to the United States from Canada.

MR. HULTMAN: Judge --

JUDGE ROSS: And if they are willing to do that, they must be willing to fabricate other evidence. And it's no wonder that they are unhappy and disbelieve the things that happened in our courts when things like this happen.

MR. HULTMAN: Judge Ross, I in no way do anything but agree with you totally.

JUDGE ROSS: And you try to explain how they get there is not legally relevant in the case, and they don't understand that.

MR. HULTMAN: I understand, Your Honor.

JUDGE ROSS: We have an obligation to them, not only to treat them fairly, but not give the appearance of manufacturing evidence by interrogating incompetent witnesses.

MR. HULTMAN: Your Honor, I agree wholeheartedly, and I certainly have no quarrel with that, and that is why I say, as I indicated, I ultimately made a decision that I made, and I made that decision personally. I think the trial, itself, Your Honor, and the record in its totality, as well as its

individuality will show the very posture that the court has now indicated. And as a legal matter, I think that that is correct. Although, I certainly accept what the court has just said in totality, and I agree with it one hundred percent, Your Honor.

Now, later on then, the counsel again indicated at Page 3455 at the record, that anyone who talked to her, and he was referring to Myrtle Poor Bear, for even a few minutes would immediately know that she was an unbelievable witness. Now, those are just -- that's all from the defense' side of the house, Your Honor. That has nothing to do from the Government's side of the house. So I believe that the ruling was a proper, discretionary one on the court, and he would have opened up a Pandora's Box into things that had absolutely nothing to do with the ultimate issues at trial,

because she knew nothing, absolutely nothing, without question, about what took place.

JUDGE ROSS: Was she there at the time?

MR. HULTMAN: No, she was not. I don't think there is any question on the part of anybody, there is not one scentilla of evidence that indicates, finally, that she is there and has anything to testify to the events.

JUDGE ROSS: All of this was in the affidavits?

MR. HULTMAN: Yes, that is correct, Your Honor. Now, let me move, Your Honor, for a minute or two to the other crime issues that Mr. Kunstler addressed.

* * * * * * * * * * *

UNITED STATES of America, Appellee

v.

Leonard PELTIER, Appellant.

No. 83-1056.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 13, 1983.

Decided April 4, 1984.

Before HEANEY, ROSS and JOHN R. GIBSON, Circuit Judges.

PER CURIAM.

On April 18, 1977, a jury found Leonard Peltier guilty on two courts of first degree murder under 18 U.S.C. §§ 2, 1111, and 1114 (1982). He was sentenced to two consecutive life sentences. We affirmed the judgment of conviction on direct appeal. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979). On April 20, 1982, Peltier filed a motion to vacate the judgment and for a new trial pursuant to

28 U.S.C. § 2255 (1976). On December 15, 1982, he filed a motion to disqualify the district court from considering his section 2255 motion; he also requested a new trial based on newly discovered evidence under Fed.R.Crim.P 33. The district court denied his motion for disqualification, 553 F.Supp. 886, and his motions to vacate and for a new trial. 553 F.Supp. 890. The court made each of its rulings without benefit of an evidentiary hearing.

On appeal, Peltier's principal contention is that the district court erred in denying him an evidentiary hearing in which he could prove his substantive claims. He asks us to reverse the district court's denial of his motions on the merits and to remand the action to another district judge for a full evidentiary hearing. We affirm the district court's order denying

Peltier's disqualification motion. Peltier's substantive claims raise more difficult questions.

The key to Peltier's motions is the relevance and interpretation of thousands of documents he received after trial via the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), regarding the government's investigation of his case. He claims that many of these documents should have been produced and made available to him at his criminal trial under the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Given this focus of his section 2255 motion and the discretion which a district court possesses when ruling on a Rule 33 motion, we consider these two motions as essentially interchangeable. See Lindhorst v. United States, 585 F.2d 361, 365 n.8 (8th Cir. 1978). Thus, we need not address the

serious question of the timeliness of Peltier's Rule 33 motion. See Fed.R.Crim.P. 33 (new trial motion "based on the ground of newly discovered evidence may be made only before or within two years after final judgment").

Peltier asserts that the FOIA documents he received raise many issues of fact relevant to his Brady/due process claims, but that we need not concern ourselves with all of them on appeal. As a result of this approach, he fails to detail each of the points on which he believes the district court should have granted an evidentiary hearing. He only explains one "illustrative and critical example" of the factual disputes raised by the FOIA documents. Besides this one example, Peltier would have us accept on faith his assertion that the FOIA documents raise questions about the fairness of his criminal trial. After a careful

review of the decision below and the record on appeal, we find no error in the district court's decision to dismiss without a hearing all allegations of purported prejudicial concealment by the government save the one example detailed in Peltier's brief and specifically argued to this Court. That example concerns the validity of FBI ballistics tests linking a .223 caliber bullet casing found during the investigation of the murders in question to an AR-15 rifle attributed to Peltier on the day of the killings.

The facts relating to the murders for which Peltier is now in prison are detailed in our earlier opinion on direct appeal. United States v. Peltier, supra, 585 F.2d at 318-320. In brief, Peltier and other members of the American Indian Movement (AIM) were being followed by FBI Special Agents Jack Coler and Ronald

Williams as they drove into the Pine Ridge Indian Reservation in South Dakota on June 26, 1975. The AIM members were in a red-and-white pickup truck or van, and Coler and Williams followed in separate cars. The agents were looking for James Theodore Eagle in connection with a prior armed robbery and assault with a deadly weapon. The red-and-white vehicle stopped at a fork in the road, and Peltier and others allegedly exited the vehicle with weapons drawn and began firing at the FBI agents.

The evidence indicates that the agents were both outnumbered and under-equipped for the ensuing exchange of fire. Both were wounded by distant fire as they crouched behind their cars, but the shots which ultimately killed each agent were allegedly fired at close range in execution style. Several AIM members fled the reservation soon after the

killings. Peltier was arrested in Canada and extradited to this country in December of 1976.

The FBI investigation of these murders, referred to as RESMURS (short for "reservation murders"), uncovered numerous weapons and thousands of bullet casings and fragments. The casing of a .223 caliber bullet was found in the trunk of Agent Coler's car. The size and type of the casing matched the high velocity, small caliber characteristics of the weapon which fired the fatal shots killings both Coler and Williams. The casing was allegedly ejected into the open trunk of the car at the time of the killings. FBI firearms examiner Evan Hodge testified at Peltier's trial that this casing had been loaded into and extracted from an AR-15 rifle which had been recovered, albeit in damaged condition, after a car carrying several AIM

members, exploded on the interstate near Wichita, Kansas, on September 10, 1975. He stated that this opinion was based on a comparison of the microscopic characteristics of the extractor marks on the rim of the cartridge case made in late December, 1975, or early January, 1976. His extractor mark conclusion was described in a lab report, in evidence, dated February 10, 1976. He further stated that he could reach no conclusion as to whether the AR-15 had actually fired the bullet from that casing, apparently because the damage to the rifle in the car explosion marred the firing pin and breech face surfaces from which such a conclusion could be drawn. The government put on independent evidence linking Peltier to that AR-15 rifle on the day of the murders, even though he was not in the Wichita area when the gun was confiscated.

The importance of this bullet casing to the government's case against Peltier cannot be ignored. During argument to the jury at the close of the trial, counsel for the government stated, "One shell casing is ejected into the trunk of the agent's car which was open, one shell casing, perhaps the most important piece of evidence in this case. This little, small cartridge is ejected by the killers into the trunk of the car.***." Tr. at 4996 (April 15, 1977). We recognized the importance of the casing in our opinion on direct appeal. We noted, "The .223 caliber cartridge casing allegedly found in the trunk of Coler's car was critical evidence against Peltier." United States v. Peltier, supra, 585 F.2d at 329.

Against this backdrop, Peltier raises one "critical example" of evidence in the government's possession prior to his trial which brings into question the

weight, if not the truth, of the expert testimony linking the .223 casing to the Wichita AR-15. He cites an October 2, 1975, FBI teletype not available to him until his civil FOIA action after conviction, which reads in pertinent part:

> RECOVERED .223 CALIBER COLT RIFLE RECEIVED FROM SA ____ BATF, CONTAINS DIFFERENT FIRING PIN THAN THAT IN RIFLE USED AT RESMURS SCENE.

Peltier alleges that this teletype indicates that the bullet casings found at the RESMURS scene, including the .223 casing found in Coler's trunk, had been tested against the Wichita AR-15 (.223 caliber colt rifle) and had come up negative. Such tests would have discredited Hodge's testimony that no conclusion could be reached from a firing pin analysis of the Ar-15 because of its damaged condition, and would seriously have undermined the inference that the gun in fact fired the fatal bullets which

the government urged the jury to draw from the positive extractor mark testimony given by Hodge.

[1] Peltier's section 2255 claim is that the failure of the government to provide him with a copy of this teletype prior to his criminal trial denied him the due process protected by the fifth amendment to the United States Constitution. See Brady v. Maryland, supra, 373 U.S. at 85-86, 83 S.Ct. at 1195-1196. Whether the government's nondisclosure of Brady exculpatory material requires reversal depends on the nature of the material and the specificity of defense requests for disclosure: (1) if the undisclosed evidence demonstrates that the prosecution introduced testimony it had reason to know was perjured, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the

judgment of the jury," United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)(footnote omitted); (2) if a specific request for evidence was made by the defense, but such exculpatory evidence was not given, then the conviction or sentence must be overturned if the evidence "might have affected the outcome of the trial," id. at 104, 96 S.Ct. at 2398; and (3) if only a general request or no request for exculpatory evidence was made, then the prosecution's nondisclosure of such evidence will constitute constitutional error only if "the omitted evidence creates a reasonable doubt that did not otherwise exist," id. at 112, 96 S.Ct. at 2402.

the district court considered the October 2 teletype as if it might evince perjured testimony and as if no request for its disclosure had been made--the

first being the standard of review most favorable to the defendant. Under either standard, the court found that the teletype did not raise a new question not presented to the jury at trial, and therefore no evidentiary hearing was required to dismiss Peltier's due process claim. We quote from the court's memorandum and order:

> [P]etitioner has alleged that Special Agent Hodge intentionally misled the jury or more probably perjured himself when he testified at the trial of Peltier. Petitioner alleges that Hodge testified that a conclusive firing pin comparison between the .223, Ex. 34B, shell casing found in the trunk of Agent Coler's car, and the AR-15 rifle recovered from Wichita, Kansas, could not be performed due to the rifle's damaged condition, but that newly discovered evidence indicates that a firing pin comparison between the rifle and the .223 casing was in fact performed and produced negative results. The alleged newly discovered evidence is an October 2, 1975 FBI teletype included among the FOIA materials provided to petitioner.
>
> The teletype and an October 31, 1975 laboratory report authored by

> Hodge are obviously related. The laboratory report was received in evidence as Exhibit 135. It referred to tests done on some .223 shell casings and the AR-15 rifle, Exhibit 34A. The October 31, 1975 laboratory report appeared to be inconsistent with t February 1 [sic], 1976 laboratory report also authored by Hodge which referred to tests done on shell cases recovered from the general RESMURS area. Exhibit 34B, found in the trunk of Special Agent Coler's automobile, was specifically covered in the repot. The court allowed the inconsistent earlier report to be received in evidence and go to the jury even though defense counsel declined to give Hodge a Rule 613(b), Federal Rules of Evidence, opportunity to explain the discrepancy. Because the inconsistent report was admitted, even though inadmissible under the rule, the court did not permit defense counsel to argue the discrepancy. The jury in it consideration of the inconsistent reports could have concluded on the basis of Hodge's testimony that the .223 shell casings referred to in the October report did not include the casing, Exhibit 34B, found in the trunk of Coler's automobile. Petitioner's allegation that Hodge gave perjured testimony is a clear misstatement of the record and is obviously without substance or materiality.

United States v. Peltier, 553 F.Supp. 890, at 895-896 (D.N.D. 1982).

The court made a similar analysis under the "no request/reasonable doubt" standard. Id. at 903. Based on the conclusion that the October 2 teletype raised no more of an inconsistency than the October 31 report, which was before the jury, the court found no need for an evidentiary hearing on the matter.

We agree with the court insofar as its interpretation of the teletype, and the interpretation pressed on appeal by Peltier, is concerned. That interpretation--that a firing pin test was done on the .223 casing with the AR-15 firing pin before October 2, 1975, and it proved negative--is not the only one which can be drawn from the October 2, teletype, however. Indeed, if this were the only interpretation which could be drawn, then that discrepancy had already been put before the jury and we would find no need for further consideration of the issue.

The teletype does not simply say that the firing pin test came up negative, however--it says that the AR-15 "contains [a] different firing pin than that in [the] rifle used at [the] RESMURS scene." [Emphasis added.] This language raises several possibilities not considered by the district court and not as readily explained away by the record as it presently exists. For example, the use of the work "different" could indicate that the FBI knew the firing pin in the damaged AR-15 had been changed after the June 26, 1975, murders. Such a discrepancy can be found nowhere else in the record, and could raise questions regarding the truth and accuracy of Hodge's testimony regarding his inability to reach a "conclusion" on the firing pin analysis and his positive conclusion regarding the extractor markings.

We do not mean to imply that the October 2, teletype establishes that the motives or actions of any FBI agent or government prosecutor were improper. Further investigation into this matter may simply show that the use of the word "different" in the teletype was an inaccurate way of expressing exactly what the October 31 laboratory report said--that the AR-15 could not be positively matched with any of the casings which had been tested at that time based on firing pin comparisons. We think it inappropriate, however, to simply assume this resolution of the new discrepancy raised by the October 2, teletype without hard evidence one way or the other.

Section 2255 clearly expresses a preference for evidentiary hearings "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no

relief." 28 U.S.C. § 2255 (1976). We have recognized such preference in holding that "a hearing must be granted when the facts alleged in the motion would justify relief, if true, or when a factual dispute arises as to whether or not a constitutional right is being denied." Smith v. United States, 635 F.2d 693, 696 (8th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1397, 67 L.Ed.2d 368 (1981); accord Lindhorst v. United States, supra, 585 F.2d at 364-365. In our view, the language of the October 2 teletype raises factual questions bearing directly on Peltier's legal claim that the government denied him due process in withholding the teletype from him prior to his trial. At the very least, section 2255 affords him the opportunity to adduce evidence to support such a legal contention.

[2] In light of this item of evidence not sufficiently explained by the files and records, we remand to the district court for an evidentiary hearing. At this hearing, the court shall limit its consideration to any testimony or documentary evidence relevant to the meaning of the October 2, 1975, teletype and its relation to the ballistics evidence introduced at Peltier's trial. The court shall then rule on whether the evidence adduced below supports Peltier's contention that its nondisclosure violated the Brady doctrine, requiring a new trial. Any appeal properly brought from the court's decision shall be handled on an expedited basis and docketed for reconsideration by this panel.

PLAINTEXT TELETYPE

TO SAC, RAPID CITY (70-10239)

FROM DIRECTOR FBI (89-3229)

RESMURS

REFERENCE YOUR TELETYPE 9/12/75 AND LABORATORY REPORT PC-M0133 NM, 8/5/75.

THE .308 WINCHESTER CALIBER REMINGTON MODEL 760, CARBINE, SERIAL NUMBER OBLITERATED, OBTAINED FROM SPECIAL AGENT MIKE GAMMAGE, BUREAU ALCOHOL, TOBACCO AND FIREARMS, (BATF) U.S. TREASURY DEPARTMENT, WAS IDENTIFIED AS HAVING FIRED .308 WINCHESTER CALIBER CARTRIDGE CASE, Q336 IN REFERENCED LABORATORY REPORT, RECOVERED AT RESMURS SCENE FROM DENVER BUCAR.

TRAINING DIVISION, QUANTICO, ADVISES THAT NO FIRED SPECIMENTS FROM THE .308 WINCHESTER CALIBER REMINGTON, MODEL 760, CARBINE, SERIAL NUMBER 6967042 ON FILE.

EFFORTS CONTINUING AT REMINGTON ARMS COMPANY TO SUPPLY BUREAU WITH SERIAL NUMBERS OF ALL MODEL 760 CARBINES IN .308 WINCHESTER CALIBER PRODUCED AND SHIPPED TO CUSTOMERS FROM JULY TO DECEMBER, 1969, IN ATTEMPT TO PROVE IDENTITY OF RECOVERED CARBINE BY PROCESS OF ELIMINATION METHOD AS IT IS BELIEVED MAJORITY OF THESE WEAPONS WERE PRODUCED FOR AND RECEIVED BY THE BUREAU.

RECOVERED .223 CALIBER COLT RIFLE RECEIVED FROM SA BATF, CONTAINS DIFFERENT FIRING PIN THAN THAT IN RIFLE USED AT RESMURS SCENE.

EXAMINATIONS CONTINUING.

REPORT FOLLOWS.

TELETYPE

6:42 PM NITEL 10/2/75 DLS

TO DIRECTOR (89-3229)

FROM RAPID CITY (70-10239) (P)

ATTENTION: FBI LABORATORY - FIREARMS SECTION; IDENTIFICATION DIVISION - LFPS

RESMURS

RE MINNEAPOLIS LETTER TO BUREAU SEPTEMBER 15, 1975; RAPID CITY TELETYPE TO BUREAU (ATTENTION LABORATORY) SEPTEMBER 27, 1975; AND BUREAU TELETYPE TO RAPID CITY OCTOBER 2, 1975.

IF NOT ALREADY DONE, LABORATORY - FIREARMS SECTION REQUESTED TO COMPARE SHOTGUN SHELLS AND CASINGS FOUND AT SCENE OF RESMURS WITH BUREAU SHOTGUN, SERIAL NUMBER S043910V, RECOVERED FROM SUSPECT DALE SHEPARD AND HANDCARRIED TO LABORATORY ON JULY 23, 1975, TO DETERMINE IF ANY WERE FIRED FROM BUREAU SHOTGUN.

REFERENCED BUREAU TELETYPE OCTOBER 2, 1975, INDICATED .223 CASINGS NOT IDENTIFIABLE WITH AR-15 RIFLE LOCATED IN VEHICLE WHICH EXPLODED ON KANSAS TURNPIKE SEPTEMBER 10, 1975. LABORATORY REQUESTED TO COMPARE ALL .223 CASINGS WITH AR-15 RIFLE (SERIAL NUMBER OBLITERATED) LOCATED AL RUNNING'S PROPERTY SEPTEMBER 11, 1975, AND SUBMITTED TO LABORATORY SEPTEMBER 15, 1975, UNDER MINNEAPOLIS FILE 70-10488.

IF NOT ALREADY DONE, LATENT FINGERPRINT SECTION REQUESTED TO COMPARE MAJOR CASE PRINTS OF DARRELL "DINO" BUTLER AND ROBERT EUGENE ROBIDEAU WITH ANY LATENTS OF VALUE DEVELOPED ON SHELL CASINGS RECOVERED AT RESMURS CRIME SCENE. PARTICULAR EMPHASIS SHOULD BE PLACED ON CASINGS FOUND IN VICINITY OF AGENTS' BODIES AND DENVER BUCAR.

ARMED AND DANGEROUS.

REPORT
of the
FBI
LABORATORY
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

To: SAC, Kansas City October 31, 1975

FBI FILE NO. 89-3229

LAB. NO. PC-M1771 NM LP

Re: RESMURS

Specimens received
Specimens personally delivered by Special Agent Mike Gammage, Bureau of Alcohol, Tobacco and Firearms, U.S. Treasury Department, on 9/12/75:

K39 .308 caliber Remington, Model 760, carbine, serial number obliterated
K40 .223 caliber Colt, AR-15, rifle, serial number obliterated
K41 .270 caliber Interarms, Mark X Mauser, rifle, Serial Number B40046
K42 .38 Special I.N.A. revolver, Serial Number 074393

Result of examination:

The K39 carbine was identified as having fired the Q336 cartridge case (Laboratory report PC-M0133 NM, dated August 5, 1975) which was recovered at the RESMURS scene.

None of the other ammunition components recovered at the RESMURS scene could be associated with speciments K40 through K42.

The last digit of the obliterated serial number on specimen K39 was restored and was determined to be a "2." The other digits in the serial number are not restorable. The obliterated serial number on specimen K40 was restored and was determined to be "SP21705."

Specimens K40, K41 and K42 were returned to Mr. Dan Hartnett, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., on October 3, 1975.